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No. 74-1579

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASIMIR STASZCUK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WARREN WOLFSON
221 North LaSalle Street
Chicago, Illinois 60601
Attorney for Petitioner

SHERMAN C. MAGIDSON
CARL P. CLAVELLI
on the brief

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Casimir Staszcuk, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on May 16, 1975.

OPINIONS BELOW

The majority and concurring opinions of the original panel of the Court of Appeals are reported at 502 F.2d 875, and are reprinted as Appendix A, *infra.*

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The majority and dissenting opinions of the Circuit *en banc*, as yet unreported, are reprinted as Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals, Appendix C, *infra*, was entered on May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether the District Judge, by refusing to ask prospective jurors whether they had ever been involved in, or interested in the outcome of, a zoning matter, whether they had ever served on a petit jury in a criminal case or on a grand jury, the length of their residences at their present addresses and their immediate preceding addresses, with whom they lived and the employment status of these persons, and by refusing to ascertain the marital status of prospective male jurors, deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and denied him due process of law and the right to trial by a fair and impartial jury?

2. Whether Petitioner's acceptance of voluntarily offered money, given in consideration of Petitioner's not objecting to a zoning change, amounts to extortion "under color of official right," as prohibited by the Hobbs Act, where Petitioner did not obtain this money through an illegal claim or assertion of right by virtue of his public office?

3. Whether the Hobbs Act applies, in the absence of evidence that a payment of money, or the result thereof, had any effect on interstate commerce, because of a potentiality of effect on commerce?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article One, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * *

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * *

Section 1951, Title 18, United States Code, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> * * *

Rule 24 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides in pertinent part:

> (a) *Examination.* * * * In the event the court [conucts the examination, it] shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.
>
> (b) *Peremptory Challenges.* * * * If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. * * *

STATEMENT

Petitioner, a Chicago Alderman, was charged in a nine-count indictment returned by the Grand Jury for the Northern District of Illinois with various offenses against the United States arising out of his alleged receipt of money on three occasions as a result of his not opposing three separate zoning changes sought with respect to property situated in his ward.

Counts 1 through 3 charged violations of the Hobbs Act,[1] each based on a separate transaction, but couched in the same language. Thus, Petitioner was charged with obstructing, delaying and affecting commerce "by means of extortion" in that he "obtained property not due either him or his office, in the form of $3,000, in cash, from Al C. Allen, *with his consent being induced under color of official right.*" (Emphasis added) Allen, described as a "zoning consultant" who applied to the City Council for the zoning

[1] 18 U.S.C. § 1951 (See *supra* p. 3 for pertinent text).

changes, made the payments because he "believed and feared that he would be unable to procure a zoning change * * * unless he compensated defendant to refrain from objecting to such a change as a member of the Chicago City Council." (E.g., Count 1, par. 8; R. 1, pp. 2-3)[2] These zoning changes were essential, it was charged, to enable Allen and his clients to erect buildings not authorized under existing Zoning Ordinances, and to sell the property to prospective purchasers who intended to erect buildings not authorized under existing Zoning Ordinances.[3] Finally, each count alleged that the buildings constructed, "and to be constructed," were erected, "and to be erected," with materials that moved, "and were to move" in interstate commerce.[4] (E.g., Count 1, pars. 6 and 7; R. 1, p. 2)

Counts 4 through 7 charged violations of the mail fraud statute.[5] In sum, Petitioner was described in these counts with having devised a scheme to defraud the City of Chicago, its citizens, and owners, investors, lessees and oc-

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[2] "R. ....., pp. ....." references are to the paginated trial record filed in the Court of Appeals. "Tr. ....." references are to the Transcript of Proceedings, also filed in the Court of Appeals. At times, the date of the trial proceedings is added to further identify the Transcript reference.

[3] No evidence was offered to show that Allen had any interest in the subject properties, or that he was, in any degree, interested in the structures built or intended to be built on these properties. Allen's sole interest was in the fee which he "earned" as a "zoning consultant."

[4] This form of pleading was necessary in the case of Count 3 because the building that was intended to be built as a result of the zoning change was, for reasons unrelated to the facts in this case, never built. (See, *infra*, pp. 14-15)

[5] 18 U.S.C. § 1341.

cupants of real property in Chicago of their right to have zoning and rezoning in the city regulated honestly and free from corruption, fraud and conflict of interest. (E.g. Count 4, par. 3; R. 1, pp. 6-7) The decision of the original panel of the Seventh Circuit that the mailings alleged in support of these counts were not in execution of the alleged scheme (App. A, *infra*, p. 11), upheld by the Circuit *en banc* (App. B, *infra*, p. 29), obviates further discussion of these charges.

Counts 8 and 9, respectively, charged that Petitioner filed false 1968 and 1970 income tax returns,[6] by omitting to declare $3,000 in total income for 1968 and by understating his 1970 adjusted gross income by $4,500. (R. 1, pp. 14-15)

Following jury verdicts of guilty on each count and denial of appropriate post-trial motions, Petitioner was sentenced to the custody of the Attorney General for a period of 18 months on each count, the sentences to run concurrently. (R. 18-19) The original panel of the Court of Appeals held that the requisite effect on interstate commerce had not been proved as to Count 3. (App. A, *infra*, pp. 5-7) Furthermore, the panel held that the mailings proven in support of Counts 4 through 7 were not in execution of the alleged scheme to defraud. (App. A, *infra*, pp. 9-11) Accordingly, Petitioner's conviction on these counts was reversed. The panel, however, affirmed Petitioner's conviction on the remaining counts, rejecting his claims that the District Judge's limitation of *voir dire* deprived him of a fair and meaningful opportunity to exercise his peremptory challenges, and that the evidence in this case did not establish extortion "under color of official right."

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[6] 26 U.S.C. § 7206(1).

A five-judge majority of the Circuit, rehearing the case *en banc*, reversed the holding of the panel as to Count 3, and affirmed the panel on all other grounds. In so doing, however, the majority, as had the original panel (App. A, *infra*, p. 12), expressed its disapproval of the District Judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses. (App. B, *infra*, p. 29, n.20)

Three judges dissented from the view of the majority as to the proof of effect on interstate commerce. In sum, they adhered to the view of the original panel that Petitioner's conduct "had no effect whatsoever on interstate commerce * * * *" (E.g., App. B, *infra*, p. 33) Judge Pell further concluded, with respect to this application of the Hobbs Act, that the opinion of the majority represented "a substantially incorrect extension of federal jurisdiction into a localized crime." (App. B, *infra*, p. 33)

Two judges also dissented from the majority's view that the jury *voir dire* had been adequate. Judge Pell, a member of the original panel, revised his view on the basis of his re-examination of the record and Judge Swygert's dissenting opinion, and concluded that "the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the appellant a fair trial." (App. B, *infra*, p. 41) Judge Swygert found that the refusal to ask whether a prospective juror had previously served as a petit or grand juror in criminal matters, the refusal to inquire about the length of residence of the jurors at their present addresses and about their residence immediately prior thereto, and the refusal to ask whether any of the jurors had ever resisted or taken a position with respect to any proposed zoning change—all as requested by the defendant—thwarted a meaningful op-

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portunity for the defendant to exercise his right to peremptory challenges and impinged upon the essential demands of fairness. (App. B, *infra*, pp. 31-2)

We set forth below only such facts as are necessary for a basic understanding of the case and the questions presented.

1. By limiting the voir dire of prospective jurors, the District Judge deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and thus denied him due process of law and the right to trial by a fair and impartial jury.

Prior to trial, the defendant submitted in writing various questions to be asked prospective jurors upon their *voir dire*. (R. 5) These questions included:

"1. • • •

a. How long have you lived at your present address?

b. Where did you live before moving to your present address?

c. With whom do you live?

d. What are the names and ages of the members of your immediate family? Where do they live?

"2. Do you now or have you ever owned any real estate, including a home or apartment building?

a. If so, have you ever attempted to have the zoning for that property changed?

b. Have you ever resisted another's attempt to obtain a zoning change?

c. Have you ever taken a position one way or another with respect to any proposed zoning changes?

• • •

"9. What is the business, profession or occupation of your spouse? Parents? Children?

* * *

During the course of the *voir dire* the District Judge, although requested to do so, refused to inquire into the marital status of male jurors and whether prospective jurors had had any prior grand or petit jury experience.[7] (Tr. 53-5)

The District Judge gave general cautionary admonitions, at the inception of the *voir dire*, concerning the necessity of selecting a fair and impartial jury (Tr. 11), the presumption of innocence (Tr. 12,16), and the burden of proof. (Tr. 16-19). He inquired of the venire as a whole whether anyone knew the attorneys representing the Government or the defense, the defendant, the investigating I.R.S. Agent or Al C. Allen. (Tr. 19-21) He also inquired whether any prospective juror had been, or had a friend or relative who had been, employed by a law enforcement agency. (Tr. 24)

He asked whether any of the prospective jurors "ever had any property in which there was some discussion, or maybe more than a discussion, in regard to changing the zoning regulations in regard to this property * * *" (Tr. 21)

The District Judge asked the venire whether anyone had a prejudice against persons in politics, including elected public officials; similarly, he asked whether anyone was prejudiced against the defendant because he was an elected alderman. (Tr. 21-2) He also inquired whether any

[7] The District Judge did inquire of female jurors concerning their marital status and their husbands' occupations. (E.g., Tr. 43-4)

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prospective juror had been active in politics other than as a voter (Tr. 22), or held a political job. (Tr. 24)

He inquired whether any prospective juror had ever discussed "this particular case before coming into this jury box to serve as jurors in such a way that it would prejudice you from giving either the Government or the defendant a fair trial" (Tr. 22), and whether any prospective juror had read about this case. (Tr. 29)

Each member of the panel was asked his or her place of residence, occupation, length of occupation, and whether he or she could think of any reason why he or she could not give both sides a fair trial. (E.g., Tr. 31-33) In addition, female members of the panel were asked their marital status and, if married, their husbands' occupations. (E.g., Tr. 33-4, 51)

The entire jury selection occupied less than a full afternoon's session of court.

2. Inasmuch as Petitioner did not obtain property through an illegal claim or assertion of right by virtue of his public office, his acceptance of voluntarily offered money did not amount to extortion "under color of official right," as prohibited by the Hobbs Act.

Background Procedures

Applications for changes to the Chicago Zoning Ordinances are filed on a standard form in the City Collector's Office. The application is introduced before the City Council, and referred by the Council to its standing Committee on Building and Zoning ("Committee"). This Committee is composed of aldermen appointed by the

Mayor.[8] The Chairman of the Committee schedules the applications for discussion at public hearings.

Prior to the public hearing, a copy of the proposed amendment is also submitted to the Development and Planning Commission ("Commission"), an independent city agency. The Commission, after study, determines the desirability or undesirability of a proposed change and reports its findings and recommendation to the Committee. The Committee usually follows the recommendation of the Commission.[9] (Tr. 118-19) It does so even in the face of an opposing recommendation by the alderman in whose ward the subject property is located. However, based on one experience in the previous year, the Committee liaison officer said that, if an alderman had a strong objection to a zoning change, the Committee would deny it regardless of what the Commission recommended.

Nevertheless, at one public hearing during which a proposed zoning change in his ward was aired, Petitioner said: "I urge the Committee not to favor" the proposed change. The proposal passed nonetheless. (Tr. 393-4; D.G.Ex. 9)

Also, the Committee would often reject changes proposed or supported by an alderman, but opposed by the Commission. (Tr. 393-4; D.G.Ex. 9)

Committee decisions are made in executive sessions. The Committee has the option of opposing, rejecting, or deferring action on a proposed change. (Tr. 121-3) After the

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[8] Petitioner, a Republican alderman, was never a member of this Committee.

[9] The liaison officer for the Committee could recall only one occasion during the year preceding trial when the Committee did not follow a recommendation of the Commission. (Tr. 129)

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Committee votes its recommendation, that recommendation is presented to the City Council for vote by that body. (Tr. 96-8)

Evidence of Extortion

Each of the three transactions comprising the Hobbs Act counts followed the same general course. A property owner, desiring to build or to remodel an existing structure, would contact Allen regarding the procurement of a zoning change which would permit the proposed structure. (E.g., Tr. 147-9, 153-4; 173-4; 188-94) Allen charged a $5,000 fee which he described as tax deductible and refundable if the proposed change should fail.[10] (Tr. 149, 161-2; 174-7; 181-3, 190-8)

In two of the transactions Allen went to Petitioner, told him he had been consulted concerning a proposed zoning change for the specific property involved, and asked whether Petitioner had any objection to the change.[11] On both occasions, Petitioner said he would investigate the matter and get back to Allen. (Tr. 6/19/73—pp. 9, 23) Sometime later Petitioner told Allen that as far as he could see the proposed change was proper and he would not object. (Tr. 6/19/73—pp. 10, 24) At this point, in connection with the first transaction only, Allen told Petitioner either that, if he "got the zoning amendment through, there [was] $3,000 in it for him" (Tr. 6/19/73—p. 10), or that he would "take care of" Petitioner if the zoning change went through. (R. 15, p. 3)

Following his receipt of knowledge that Petitioner would not oppose the proposed changes, Allen received his

[10] In one transaction (Count 3), Allen charged a $5,500 fee.

[11] Apparently, Allen did not seek to learn Petitioner's attitude concerning the other transaction before he filed the proposed zoning change.

"fees" from his "clients." (Tr. 6/19/73—pp. 7-8, 22) Thereafter he filed, or caused the filing of, the requisite applications.[12] (Tr. 103-4; 114)

When the Committee recommended passage of the changes, Allen paid Petitioner $3,000. The first payment was in cash. (Tr. 6/19/73—pp. 13-14, 99) The second payment consisted of $1,000 in cash and a $2,000 check. (Tr. 6/19/73—pp. 19-21) The third payment consisted of $1,500 in cash and a $1,500 check. (Tr. 6/19/73—pp. 26-7)[13] Allen's clients had no knowledge of these payments.

Allen said he made these payments to Staszcuk "because [he] wasn't going to get any resistance on the zoning amendment and he [Staszcuk] had no objection to it" (Tr. 6/19/73— p. 17); and because he "didn't resist the zoning amendment change." (Tr. 6/19/73— pp. 19-20; 26-7) Asked what would have happened, in his opinion, if Petitioner had resisted the zoning change, Allen responded: "If the alderman was against the zoning amendment, I wouldn't get it." (Tr. 6/19/73— pp. 20-1)

Staszcuk attended two of the three public committee hearings and supported the proposed changes. He did not attend the public hearing held in conjunction with the Count 2 transaction. (Tr. 124-5)

All three proposals unanimously passed the City Council.

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[12] Petitioner, who testified that he was asked by the property owner involved in the Count 1 transaction to do so, filed the application for that change.

[13] Staszuck did not report the $3,000 cash payment on his 1968 tax return. He did report receiving $1,500 through a proprietorship owned by him on his 1970 return, but he did not report the remaining $4,500. Petitioner denied receiving the cash payments. He testified the checks were referral fees for real estate business he sent Allen.

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3. The Hobbs Act does not apply in the absence of evidence that the payment of money, or the result thereof, had any effect on interstate commerce.

It was stipulated (R. 7) that materials to construct and furnish the structures built as a result of the Count 1 and Count 2 transactions were furnished from without the State of Illinois. The situation differed with respect to the property involved in the Count 3 transaction.

After the zoning change on the property involved in this transaction was obtained, the owner took bids for the proposed animal hospital from three prospective contractors. However, the veterinarian for whom the structure was to be built "backed out on the whole deal" for reasons apparently unrelated to the zoning change. (Tr. 193) Instead, a food store and cleaning shop was built on the property.[14] (Tr. 6/19/73—193)

Arthur Long, the general construction estimator for one contractor, was the only "commerce" witness to testify. Basing his testimony on four "generally" similar animal hospitals built by his company over the past five years[15] (Tr. 6/19/73—292), Long said his company used plumbing fixtures manufactured in Ohio; to his knowledge such fixtures were not manufactured in Illinois. (Tr. 293) Thus, Long said that the plumbing fixtures which would have been used had the building been built "absolutely * * * probably would not" have come from Illinois. (Tr. 295) In explanation of his term "absolutely probably," Mr. Long said that, although components were manufactured

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[14] Asked whether those buildings could have been put up without the zoning change, the owner responded: "What is there now is what was required for the zoning before I had it changed * * *" (Tr. 193)

[15] Long was not familiar with the other bidders' sources of supply for building materials in the period following March, 1971. (Tr. 6/20/73—298)

in Illinois, he did not "know of any [cast iron] plumbing fixtures that are manufactured in Illinois." (Tr. 6/20/73—296, 299) Toilets, lavatories, sinks and bathtubs, which Long's company installed in all hospitals it built,[16] were not manufactured in Illinois. (Tr. 6/20/73—304)

Long's company had not previously used lighting fixtures manufactured in Illinois in building animal hospitals. (Tr. 293-4) He could not say, however, where the lighting fixtures that would have been used would have come from, because the choice of the fixtures was the prerogative of the electrical contractors. (Tr. 296) Some companies in Illinois did manufacture lighting fixtures. (Tr. 301)

To Long's knowledge, the only furnaces manufactured in Illinois were small residential furnaces (Tr. 294), which he did not consider appropriate for installation in an animal hospital. (Tr. 300) However, Long did not mean to say that such furnaces could not be used (Tr. 300), or that his company could not have used furnaces manufactured in Illinois. (Tr. 300-1) Long had no knowledge of the types or sources of furnaces used by others. (Tr. 301)

Long also said approximately 99 per cent of plate glass was manufactured outside of Illinois (Tr. 294), and that the glass his company would have used would not have come from Illinois. (Tr. 297, 303) Long did not know for certain that plate glass manufacturers did not have plants in Illinois, but he believed they did not. (Tr. 299) Again, Long was talking about his company's experience and not the experiences of other builders. (Tr. 304)

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[16] On recross examination it developed that Long was speaking about his company's construction, not about construction by someone else. (Tr. 6/20/73—304)

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REASONS FOR GRANTING THE WRIT

1. By severely limiting the voir dire of prospective jurors, the District Judge deprived Petitioner of a fair and meaningful opportunity to exercise his peremptory challenges and thus denied him due process of law and the right to trial by a fair and impartial jury.

Petitioner, charged in a politically newsworthy case with cheating his constituents, property owners and all other citizens of the City of Chicago in the administration of Chicago's zoning ordinances, and whose defense, in part, rested on the high esteem in which he was held by his neighbors and associates (Tr. 357-69), was tried by jurors whose backgrounds were all but a mystery to him. Although a majority of the Seventh Circuit concluded "that the entire examination brought out sufficient information about the seven male jurors (and one male alternate) who were accepted to enable experienced defense counsel to make a reasonably knowledgeable use of their peremptory challenges * * * *" (App. B, *infra*, p. 29, n.20), the Record, as pointed to by Judge Swygert, dissenting, reveals the paucity of the *voir dire* as a whole.

In this case, where Petitioner was literally charged with cheating persons who may have sat on the jury, the refusal of the trial judge to ask the "few specific associational questions" (*United States* v. *Leuin*, 467 F.2d 1132, 1137 (7th Cir. 1972)), requested by the defense, deprived Petitioner of due process of law and the right to trial by a fair and impartial jury. Because of the significant role played by the jury in our system of criminal justice—both from constitutional and practical points of view—the

strictures imposed on the jury selection process in this case should not go unnoticed by this Court. Review here, if for no other reason than for providing administrative guidelines such as suggested by Judge Swygert (App. B, *infra*, pp. 32-3), would serve a needed function by advising trial courts throughout the country of the parameters of fair jury selection.[1]

The restriction on *voir dire* in this case covered a broad spectrum. Because of the nature of the charges it was essential for Petitioner to know whether any prospective juror had been interested or involved, in any degree, in the zoning process. The District Judge inquired whether any prospective juror had personally sought rezoning of his or her property (Tr. 21), but he refused to inquire whether any prospective juror had "taken a position" with respect to zoning changes sought by another. As Judge Swygert aptly noted: "Some juror may have had an experience, good or bad, with a zoning request that did not affect his real estate directly but did affect indirectly his interests either as an adjacent property owner or a nearby resident." (App. B, *infra*, p. 32) Since Petitioner was accused of cheating persons who fell into this class, he was entitled to know whether any prospective juror fit this description—not solely as a means of establishing a basis for a cause challenge, but certainly to enable him to exercise intelligently his peremptory challenges.

Similarly, Petitioner was denied an opportunity to find out the length of a prospective juror's residence at his or her present address and the juror's immediate preceding address. This inquiry had a two-fold func-

[1] The Court has already spoken on this subject in racially (*Swain* v. *Alabama*, 380 U.S. 202 (1965)) and other specially sensitive (*Irvin* v. *Dowd*, 366 U.S. 717 (1961)) cases.

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tion. First, because the zoning process is an integral part of the "neighborhood concept," Petitioner should have been allowed to determine if some prospective jurors harbored incipient prejudices by reason of some experience associated with their present or immediately past neighborhoods. A prospective juror who had moved frequently from one changing neighborhood to another would certainly have been a fit candidate for a peremptory challenge in this case. Second, Petitioner's defense depended, in part, on the esteem in which he was held by his neighbors and associates. Thus Petitioner could be expected to repose greater confidence in prospective jurors who evidenced regard for concepts of neighborhood and residential stability.

Petitioner was not permitted to ascertain the marital status of prospective male jurors and, if married, the employment status of their spouses. In today's world it is inconceivable that anyone should ignore the impact that a wife and her occupation have upon a husband's attitudes.

Along these same lines, Petitioner was forbidden to learn with whom prospective jurors lived and the employment status of these persons. Again, the attitudinal impact of such persons should not be ignored.

Finally, Petitioner was not allowed to ascertain whether any prospective juror had previously served as a petit or grand juror in criminal matters. Since grand jury service exposes the individual to the inquisitorial-accusatory process rather than the adversary process, it is not surprising that few defendants, if any, are willing to accept as petit jurors persons with grand jury experience.

Prior decisions have established that, although the District Judge has a broad discretion over the conduct of

the *voir dire* examination of prospective jurors, the "exercise of this discretion, and the restriction upon inquiries at the request of counsel * * * [are] subject to the essential demands of fairness." *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931); see also *Brown* v. *United States*, 338 F.2d 543 (D.C.Cir. 1964); *United States* v. *Lewin*, 467 F.2d 1132, 1137-8 (7th Cir. 1972).

A *voir dire* may be adequate to disclose those obvious attitudes leading to grounds to challenge for cause, but it may not allow sufficient opportunity to determine other attitudes, the discovery of which is crucial to the intelligent exercise of a peremptory challenge. Thus, while the peremptory challenge may be subsidiary to the challenge for cause (*United States* v. *Dellinger*, 7th Cir. 1972, 472 F.2d 340, 367), the opportunity for its intelligent exercise is of such paramount importance that, in order to protect that right, the District Judge has an obligation beyond merely inquiring into matters that would disqualify a juror for cause. *United States* v. *Dellinger*, 472 F.2d at 367. The denial or impairment of this right—"one of the most important * * * secured to the accused"—"is reversible error without a showing of prejudice." *Swain* v. *Alabama*, 380 U.S. 202, 219-20.

If the right to peremptory challenges must not be impaired, then it must not be empty. And if, "this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." *United States* v. *Dellinger*, 472 F.2d at 368; see also *United States* v. *Lewin*, 7th Cir. 1972, 467 F.2d 1132, 1138; *United States* v. *Napoleone*, 3rd Cir. 1965, 349 F.2d 350, 353.

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The meager *voir dire* permitted by the District Judge did not allow a meaningful exercise of peremptory challenges by the defendant. In sum and in substance the defendant was compelled to exercise these challenges based upon his observance of the jurors, his knowledge of their residences and occupations (and sometimes of the length of residence and occupation), his knowledge that they had not been actively involved in politics and had not sought a zoning change for their own property, and his compelled blind acceptance of their bald assertions that they were not prejudiced against politicians and they did not see any reason why they could not be fair jurors in the case. The right to peremptory challenges clearly promises both parties more than this. *United States* v. *Dellinger*, 472 F.2d 340, 369 (7 Cir. 1972).

That this promise was breached in this case is most aptly demonstrated by the dissenting opinion of Judge Pell. (App. B, *infra*, p. 41) Judge Pell, the author of a leading Seventh Circuit decision which has recognized the problems inherent in restrictive jury *voir dire*,[2] initially concurred in the panel's decision that the *voir dire* in this case was "thorough [and] detailed." (App. A, *infra*, p. 13) Upon re-examination of the record, and "in the light of Judge Swygert's dissenting opinion," Judge Pell was "persuaded that the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the [Petitioner] a fair trial." (App. B, *infra*, p. 41)

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[2] *United States* v. *Lewin*, 467 F.2d 1132 (7th Cir. 1972).

2. Inasmuch as Petitioner did not obtain property through an illegal claim or assertion of right by virtue of his public office, his acceptance of voluntarily offered money did not amount to extortion "under color of official right" as prohibited by the Hobbs Act.

The relatively uncomplicated evidence in this case, viewed in a light most favorable to the government, is susceptible of the following interpretation: on three occasions Petitioner received money from Al C. Allen as a result of Petitioner's not objecting to zoning changes on behalf of Allen's "clients." Petitioner did not solicit these payments, nor did he elicit the offers of payment by suggesting the interposition of objections. In fact, Petitioner disclosed his non-objecting status to Allen before Allen suggested payment. Thus the pure question presented is whether it is a violation of the Hobbs Act for a public official to receive and accept money not due either him or his office where the payment is voluntarily initiated by the payor and is made because of the payor's fear that he will be unable to procure a zoning change unless he pays the public official to refrain from objecting to that change, absent any assertion of right or other solicitation by the public official. Resolution of this issue is of paramount importance in terms of future prosecutions of public officials under the Hobbs Act and further intrusion of federal law enforcement into essentially local crimes.

It is Petitioner's contention that it is not a violation of the Hobbs Act's "color of official right" language defining extortion for a public official to receive and accept money not due either him or his office, unless the money was obtained through an illegal claim or assertion of right by virtue of the public office.

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The theory under which the three Hobbs Act counts in this case were prosecuted was squarely presented in the Court's instructions to the jury:

> "Now, 'extortion under color of official right' means the wrongful taking by a public officer of money not due him or his office, even though the taking was not accompanied by specific action of the defendant demonstrating force, threat or the use of fear. If you find beyond a reasonable doubt that Casimir Staszcuk used the power and authority vested in him by his position as an alderman and a member of the city council to obtain money from Al C. Allen for not objecting to the zoning changes involved in this case, and this money was not due him or the city council, then I instruct you that you have sufficient evidence to satisfy the requirements of the law that money was obtained by extortion. * * *" (Tr. 584-5)

This theory, assertedly based on the disjunctive language of Section 1951(b) (2), defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," has found judicial expression in *United States* v. *Kenny,* 462 F.2d 1205, 1229 (3d Cir. 1972).[3] Noting that prior decisions had held that the "under color of official right" language in the statute had no applicability to extortionate acts committed by private individuals (*Bianchi* v. *United States,* 219 F.2d 182,

[3] It should be noted that *Kenny* is not authority for the theory under which Petitioner was prosecuted, inasmuch as the decision was in response to an argument that the trial court had erred by instructing disjunctively. (462 F.2d at 1229) *Kenny* did not, therefore, settle the question of whether "color of official right" applies to facts such as are involved here.

192 (8th Cir. 1955) cert. denied, 349 U.S. 915) the Third Circuit held that public officials "may also violate the statute by a wrongful taking under color of official right," which represents a statutory adoption of the common law crime, "which could only be committed by a public official, and which did not require proof of threat, fear, or duress." (462 F.2d at 1229)

While we might agree that in the common law offense of extortion "color of official right" takes the place of force, threats or other pressures (*Bianchi* v. *United States*, 219 F.2d 182, 183 (8th Cir. 1955); *United States* v. *Sutter*, 160 F.2d 754, 756 (7th Cir. 1947)), it is not equally certain that the phrase in the Hobbs Act was intended to apply to the facts demonstrated in this case. Thus, it is our contention that Stazcuk's acceptance of gratuities as a result of his not opposing these proposals was not "under color of official right,"[4] because the gratuity was not related to his official functions.

The concept of "under color of official right" originated in the common law. And, by not defining extortion "under color of official right" in the statute, Congress evidenced an intent to maintain the definition as it was applied at common law.[5]

A tendency to differentiate between bribery and extortion on the New York analysis (*People* v. *Diogardi*, 8

[4] It may have been bribery (Ill. Rev. Stat. 1973, ch. 38, §33-1(d)), or official misconduct (Ill. Rev. Stat. 1973, ch. 38, §33-3(d)), under Illinois law for Petitioner to accept these gratuities.

[5] See, e.g., *United States* v. *Nardello*, 393 U.S. 286, 289 (1969); *United States* v. *Kenny*, 462 F.2d 1205, 1229 (3rd Cir. 1972). Compare *United States* v. *Sutter*, 160 F.2d 754, 756 (7th Cir. 1947), where Congress, in fact, did adopt a definition of extortion which differed from the common law.

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N.Y.2d 260, 203 N.Y.S.2d 870 (1960)), that the essence of bribery is "the voluntary giving of something of value to influence the performance of official duty," while the essence of extortion is "duress" (203 N.Y.S.2d at 881), has been criticized. 3 Seton Hall Law Review 1, 3-5 (1971). We do not, however, seek to draw this distinction in this case, for the second distinction involving the nature of the criminal act generated by a public official's receipt of money is more significant here.

"Color of official right" has been defined as a pretended, not a real, exercise of an officer's jurisdiction; a pretense of official right to do an act, made by one who has no such right; a claim or assumption of right to do an act by virture of an office, made by a person who is legally destitute of any such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act. It is a technical expression and necessarily implies an illegal claim of right or of authority to do the act in question by virtue of office or official duty.[6] " 'An oficer's acts are done colore officii when they are of such a nature that his official position does not authorize the doing of such acts though they are done in a form that purports they are done by reason of official duty and by

[6] C.J.S., Color of Office, 352-353 (1955); 7 Cyc., Color of Office, 401-402 (1903) [cases cited]. Bouvier Law Dictionary, quoted in *Wilson* v. *Unselt*, 12 Bush (Ky) 215, 228 (1876), defines "color of office" as necessarily implying an illegal claim of right or authority to take the [money], or to do the act in question by virtue of office, which claim is a mere color or pretense on the part of the officer; and Wharton's Law Dictionary, also quoted in *Wilson*, says that it is "an act unjustly done by the countenance of an office, being grounded upon corruption, to which the office is a shadow and color."

virtue of his office.' * * * Colore officii is also defined as 'a pretense of official right to do an act, made by one who has no such right.' " [cases cited] *Aldridge* v. *Wooten*, 24 S.E.2d 700, 701 (Ga. App. 1943).

Unlike the definition supplied to the jury by the District Judge in the instant case, and implicitly adopted by the Seventh Circuit opinions,[7] extortion "under color of official right" does not mean the wrongful taking by a public officer of money not due him or his office. (*Supra*, at pp. 21-2) At common law, extortion is the wrongful taking of money or other thing of value that is not due, before it is due, or more than is due, by a public officer *who ostensibly acts under color or by virtue of his office. United States* v. *Laudani*, 134 F.2d 847, 851 n. 1 (3d Cir. 1942).[8] The

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[7] This case represents the first prosecution under Section 1951 to rely solely on subsection 2(b)'s definition of extortion as "the obtaining of property from another, with his consent, induced * * * under color of official right." The Seventh Circuit in *United States* v. *Braasch*, 505 F.2d 139, 150-151 (7th Cir. 1974), ruled that the officers' conduct was also prohibited by the first clause of subsection b(2) defining extortion as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear of economic harm and not only by the "color of official right" portion of the clause. See also footnote 3, *supra*.

[8] Note 1 refers to the Annotation contained at 4 L.R.A. 360 (1889):

> "At common law, extortion is the taking, by color of office, money or other thing of value that is not due, before it is due, or more than is due. * * * It is the exacting of fees not provided by law, sanctioned by the court, or permitted by ancient usage. * * * To constitute the offense, the officer must have acted in his official capacity; he must have demanded and received, under color of office, *fees to which he was not entitled from whom he had a right to demand them.*" [cases cited; emphasis added.]

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District Judge adopted the language supplied by this Court in *Nardello*,[9] but failed to instruct the jury as to what acts are meant by the words "color of office." In essence, the District Judge omitted the essential element that the taking be "under color of official right."

The definition of extortion given to the jury more properly described the crimes of bribery or official misconduct. *State* v. *Pritchard*, 107 N.C. 921 (1890) differentiated between bribery and extortion, thusly:

> Bribery consists in the offering or receiving of any unlawful present or reward to or by any person in order to influence [an officer's] conduct in the exercise of any public duty.
>
> Extortion consists in the unlawful taking of money or other thing of value by an officer, under color of his office, when there is nothing due, or more than is due, or before it is due.

In other words, the person who is extorted must have believed that the officer had a legal right to do the act or receive the money because of the rightful power vested in him by virtue of his office. Thus, where public officials are concerned, the object of the payment is of import. If payment is made, where none is permitted, or in excess of what is permitted, *for the performance of the official's duty*, extortion under color of official right may be maintained. *People* v. *Rudolph*, 277 App. Div. 195,

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[9] "At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion. In many states, however, the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, or threats." 393 U.S. at 289.

98 N.Y.S. 2d 466 (1950); *People* v. *Samuels,* 188 Miss. 607, 71 N.Y.S.2d 562 (1947); *Collier* v. *State,* 55 Ala. 125 (1876). Contrariwise, if the payment is for something other than what the official is required by law to do, bribery is the result. *People* v. *Samuels, supra; People* v. *Rudolph, supra.* As the Supreme Court of Alabama explained, the object of the crime of extortion "is the punishment of the abuse of official power—not the obtaining of money by mere impropriety of conduct, or by fraud, by persons filling official position." *Collier* v. *State,* 55 Ala. at 127. Thus, "* * * Demanding money of a person for whom no official service has been rendered, and on whom the officer has no claim whatever, is not extortion. It may be a cheat, or it may constitute obtaining money under false preteneses * * * *" *Collier* v. *State,* 55 Ala. at 128.

Similarly, the Supreme Court of Massachusetts has held that exortion is committed by an officer who receives "more than lawful fees by color of his office and it supposes a *right* to demand fees of the person who pays them. The excess demanded is then extorsive; * * * But fees demanded of a person not liable, or voluntarily paid by a person not liable, although improperly and unjustly taken and accepted by the officer, and although, in certain cases he may be punished for the cheat or fraud, yet this is not an extortion, as the fees, if excessive, are not obtained by color of his office." *Dunlap* v. *Curtis,* 10 Mass, 210, 211 (1813). Also, *Runnells* v. *Fletcher,* 15 Mass. 525 (1819); *Ming* v. *Truett,* 1 Mont. 322 (1871).

Since the money obtained from Allen was not for official services rendered to him, extortion by "color of office" was not committed.

This is not inconsistent with the purpose intended by Representative Hobbs. On April 9, 1943, the following dialogue took place on the floor of the House:

> "Mr. Day: Mr. Chairman, I wonder if the committee is not guilty of some inadvertence in their definition of the word "extortion" on page 2, section (c). I ask the author of the bill to follow me closely. I read:
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear—
>
> Up to that point it would amount to duress, it is clear intimidation or extortion. Then it states:
> or under color of official right.
>
> I want to ask this, and if you do not mean this in the bill, then so state in the interest of clarification of the future enforcement of this act and for the benefit of the House. * * *
>
> When you say that by extortion you mean getting money or property from a man with his consent or under color of official right, it would apply to an initiation fee in a labor union.
>
> Mr. Hobbs: Certainly not. "Color of official right" means absence of right but pretended assertion of right.
>
> Mr. Day: I know; but what do the words "official right" mean?
>
> Mr. Hobbs: The same thing.
>
> Mr. Day: It has not got to be by some authority?
>
> Mr. Hobbs: In other words, you pretend to be a police officer, you pretend to be a deputy sheriff, but you are not.
>
> Mr. Day: I think the change should be made that I have mentioned.
>
> Mr. Hobbs: It could not possibly apply if there was any bona fide right; it applies only to pretended right.
>
> * * *

> Mr. Sumners of Texas: May I suggest to my friend that if he will examine the language carefully I believe he will conclude that it means money acquired by some person who claims to be an officer of the law who is trying to take his money.
>
> * * *

89 Cong. Rec. 3228-3229 (1943).

The decision of the Court of Appeals in this case does violence to the statutory scheme and purpose described by the foregoing dialogue and common law history. As read by the Seventh Circuit, the Hobbs Act applies to any undue receipt of money by a public official without regard to the manner by which the official received the money. In other words, according to the Seventh Circuit view, a public official's liability under the Hobbs act does not depend on anything more than the fact that the official receives money to which he is not entitled.

In making this statement we might, at first blush, be criticized for ignoring the effect on the interstate commerce element of the statute, but the decision of the Court *en banc* as to Count 3 fairly well eliminates any practical value of that element as well.

3. The Hobbs Act does not apply in the absence of evidence that the payment of money, or the result thereof, had any effect on interstate commerce.

In contrast to evidence presented in support of Counts 1 and 2 showing that structures which were contemplated prior to the zoning changes were eventually built using materials obtained from without the state, the Government supported its Count 3 charge by evidence that one of three potential contractors, if it had been awarded the building contract and if the building had been built,

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would have used materials from without the State of Illinois. For reasons totally unrelated to the zoning change, the proposed structure was never built.

The issue presented by these facts is whether interstate commerce may be said to have been affected merely because one of three potential contractors using materials obtained from without the State of Illinois might have constructed a building on the rezoned property had the owner of the property decided to go forward with his initial plans. The majority of the Court of Appeals recognized that this issue is both novel and significant in light of the extraordinary growth of federal criminal litigation and the continuing transfer of power from the states to the federal government. (App. B, *supra,* p. 18) The majority found, in substance, that the Hobbs Act extends to a situation involving only a potential effect on commerce. Petitioner's view, as reflected by Judge Pell in his dissenting opinion (App. B, *supra,* pp. 33-40), requires an actual affectation of commerce before the criminal statute can take effect and confer jurisdiction on the federal courts.

As Judge Pell points out, in each case applying the Hobbs Act to date, more than a mere potentiality of interstate commerce has existed. Channels of interstate commerce were actually being used and there was either a direct threat to interfere with these channels (e.g., *United States* v. *Pranno,* 385 F.2d 387 (7th Cir. 1967)), or the response to the threat—payment of money—actually interfered. E.g., *United States* v. *Amabile,* 395 F.2d 47 (7th Cir. 1968); *United States* v. *Provenzano,* 334 F.2d 678 (3rd Cir. 1964). This is the first case applying the Hobbs Act where the channels of commerce were not actually being used, and were not subsequently used.

The practical effect of the majority decision, in light of the economic realities of today, is to extend federal jurisdiction, through the vehicle of the Hobbs Act, into almost every area of crime for gain. Every taking of money has a potential effect on interstate commerce. Persons who are robbed cannot purchase goods which invariably must, at some stage, have an out-of-state origin. The decision of the majority in this case places the federal judicial and executive branches into a role not contemplated by the framers of the commerce clause or the Hobbs Act, for federal intervention may always be rationalized in any case on the economic rationale employed by the majority.

CONCLUSION

For the above and foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WARREN WOLFSON
Attorney for Petitioner

SHERMAN C. MAGIDSON,
CARL P. CLAVELLI,
On the Brief.

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CASIMIR STASZCUK,

Defendant-Appellant.

No. 73-869

United States Court of Appeals, Seventh Circuit

Argued April 4, 1974.

Decided Sept. 10, 1974.

Rehearing En Banc Granted

Dec. 23, 1974.

• • •

Before PELL and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*

SPRECHER, *Circuit Judge.*

In 1967 defendant was elected alderman from the 13th ward in the City of Chicago. According to the evidence viewed in a light most favorable to the government, defendant accepted three payments of $3,000 each from a "zoning consultant," Al C. Allen. Allen testified he made the payments on behalf of his clients in return for defendant's agreement not to oppose their applications for zoning amendments relating to three pieces of property in the 13th ward.

Defendant was convicted by a jury on three counts of Hobbs Act violations,[1] four counts of mail fraud,[2] and

[1] 18 U.S.C. § 1951(a): "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

[2] 18 U.S.C. § 1341: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

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two counts of filing false income tax returns.[3] He was sentenced to nine concurrent sentences of eighteen months each.

I. *Hobbs Act Counts*

The indictment charged defendant with obstructing, delaying and affecting commerce "by means of extortion," in that he "obtained property not due either him or his office . . . with [Allen's] consent being induced under color of official right." The indictment specified that Allen feared he would be unable to procure the zoning changes "unless he compensated defendant to refrain from objecting to such . . . change[s] as a member of the Chicago City Council. . . ."

Apparently this is one of the first prosecutions under section 1951 to rely solely on subsection b(2)'s definition of extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right."[4]

(footnote continued)
property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[3] 26 U.S.C. § 7206(1).

[4] Another such case is pending on appeal in this court. United States v. Braasch, Nos. 74-1000-1017 and 74-1105.

All reported Hobbs Act cases charging extortion relied on the "wrongful use of actual or threatened force, violence, or fear" section of the definition. The only exception is United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972), in which defendants were charged with extortion through wrongful use of fear *or* under color of official right.

Defendant concedes, as we believe he must,[5] that under the Hobbs Act "color of official right" may replace the coercion of "force, violence, or fear."

Defendant argues, rather, that his acceptance of three $3,000 payments for not opposing the zoning changes was not under color of official right because it was not related to his official functions. An alderman need not oppose or favor a particular zoning application, and defendant offered some evidence that the City Council does not always act consistent with an alderman's position on a zoning change in his ward. His only authorities for this proposition are People v. Samuels, 188 Misc. 607, 71 N.Y.S.2d 562 1947), and Collier v. State, 55 Ala. 125 (1876). In *Samuels* a tax collector was charged with extortion for accepting a fee to "straighten out" a claim which he had

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[5] *See* United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972), in which the court approved submission of the case to the jury under instructions allowing conviction for extortion through fear or under color of official right. *See also* Chief Judge Swygert's concurrence in United States v. DeMet, 486 F.2d 816, 822-823 (7th Cir. 1973), cert denied, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947); and Stern, Prosecution of Local Political Corruption under the Hobbs Act, 3 Seton Hall L.Rev. 1 (Fall 1971), written by the prosecutor of the *Kenny* case.

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no power to settle, compromise or influence. The court held that the statute covered only situations where the service provided by the official was within the scope of his public employment. In *Collier* a county attorney accepted fees for giving professional advice as a private attorney. The court held he may have accepted money under false pretenses, but since the fees did not relate to his official function he had not committed extortion.

The government presented sufficient evidence of an alderman's influence [6] over zoning applications in his own ward that the jury could conclude defendant's official functions encompassed the unbiased consideration and treatment of all zoning applications. The payments were made to defendant to influence his exercise of the political power he held as alderman over zoning applications. To accept money in return for an agreement not to oppose such applications—in effect to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right. The evidence supports defendant's convictions for extortion.

Conviction under the Hobbs Act, however, requires proof that the extortion had at least an arguably *de minimus* effect on interstate commerce. United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), cert. denied, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974). To satisfy this jurisdictional element of the crime, the government presented evidence that on the rezoned properties in counts I and II were built apartment buildings that could not have been constructed under the previous zoning. Certain materials used in the construction of these buildings were

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[6] And of Allen's impression of an alderman's influence. *Cf.* United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).

shipped in interstate commerce. Because the rezoning, procured through extortion, created a demand for construction materials to be shipped into Illinois, the effect on interstate commerce [7] in counts I and II was direct and demonstrable.[8]

The property in count III had to be rezoned to permit construction of an animal hospital. Once the zoning change was made, however, the veterinarian for whom the hospital was to be built backed out of the deal. The owner instead erected buildings which were proper under the previous zoning. To show the rezoning's effect on interstate commerce under count III, the government presented the testimony of one of three potential contractors, who said his company would have used materials from interstate commerce if it had been awarded the contract to construct the animal hospital.

The government cites several cases for the proposition that any *potential* effect on commerce satisfies the Hobbs Act. In United States v. Pranno, 385 F.2d 387 (7th Cir.

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[7] There are no cases definitively holding that the effect on commerce either must be or need not be an adverse effect. But surely the word "affects" in the phrase "obstructs, delays, or affects" is superfluous if it is interpreted to mean "affects adversely."

[8] United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), cert denied, 390 U.S. 944, 88 S.Ct. 1028, 19 L.Ed.2d 1132 and 972, 88 S.Ct. 1094, 19 L.Ed.2d 1183 (1968); United States v. Kramer, 355 F.2d 891 (7th Cir. 1966); Anderson v. United States, 262 F.2d 764 (8th Cir.), cert. denied, 360 U.S. 929, 79 S.Ct. 1446, 3 L.Ed.2d 1543 (1959); Hulahan v. United States, 214 F.2d 441 (8th Cir.), cert. denied, 348 U.S. 856, 75 S.Ct. 81, 99 L.Ed. 675 (1954).

Since the extortion directly facilitated the flow of building materials in interstate commerce, we need not depend on a "depletion of assets" theory to show an effect on commerce. Thus we need not decide whether Allen or his clients were the victims of the extortion, or whose assets were depleted.

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1967), cert. denied, 390 U.S. 944, 88 S.Ct. 1028, 19 L.Ed.2d 1132 and 390 U.S. 972, 88 S.Ct. 1094, 19 L.Ed.2d 1183 (1968), there was no delay in construction because the extortion money was paid and the building permit issued. The court upheld the Hobbs Act convictions because "it was only necessary to prove that delay would have been caused had the owner and contractor refused payment and defendants carried out their threat to withhold the permit." 385 F.2d at 390. But here the result of the extortion payment was exactly the same as if no extortion or rezoning had occurred: no shipment of materials in interstate commerce.

The court in United States v. Hyde, 448 F.2d 815, 836 (5th Cir. 1971), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), made the point that there is no requirement "the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." But the victim companies did participate in interstate activities within a year of the payoffs which permitted them to stay in business.

The victim in United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), cert. denied, 397 U.S. 1021, 90 S.Ct. 1258, 25 L.Ed.2d 530 (1970), purchased trucks from an out-of-state corporation. By surrendering his right to solicit additional customers in response to extortionate threats by a competitor, the victim "automatically limited his future orders" for the trucks.[9] The owner of the count III property, however, was not engaged in interstate commerce at the time of the extortion; the rezoning did not

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[9] United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070, 92 S.Ct. 1518, 31 L.Ed.2d 802 (1972), is a similar case.

promote any future interstate activities because he never built the animal hospital.

We agree that the effect of the extortion on commerce does not have to be simultaneous with the extortion. Indeed, it followed the extortion by some months in counts I and II. But when the effect never materializes—despite the failure or success of the extortion—the commerce element of the Hobbs Act is not established.[10] *Cf.* United States v. Critchley, 353 F.2d 358 (3d Cir. 1965).

The convictions on counts I and II are affirmed; the conviction on count III is reversed.

II. *Mail Fraud Counts*

Applications for zoning changes are introduced before the City Council and referred to the Committee on Buildings and Zoning. The committee sets a date for a public hearing and sends form notices to occupants of buildings within 150 feet of the subject property.[11] Four such notices are the mailings charged in the four mail fraud counts. Defendant argues that the committee's mailing of these notices was not in furtherance of his scheme to defraud.

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[10] The government argues we must accept any potential effect of extortion as satisfying the Hobbs Act, or eliminate the offense of attempted extortion under section 1951, since the only effect of an attempt must be a potential effect. This is a frivolous argument, since the government can prove what the result of an extortion attempt would have been if the extortion had been successful. If the extortion is successful and there is still no effect on commerce, the extortioner has not violated the Hobbs Act.

[11] It is not clear from the record whether the committee is required by law to send these notices or does so as a courtesy to affected persons.

We begin with the proposition that "statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress." United States v. Kelem, 416 F.2d 346, 347 (9th Cir. 1969), cert. denied, 397 U.S. 952, 90 S.Ct. 977, 25 L.Ed. 2d 134 (1970). To support federal criminal jurisdiction, the mailing must be, in the words of the statute, "for the purpose of executing such scheme or artifice." The connection between the fraud and the use of the mails "must be real and proximate, not merely abstract or remote." United States v. Brickey, 296 F.Supp. 742, 748 (E.D.Ark. 1969).

The requisite connection was established in Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954), where the victim used the mails to procure the cash she turned over to defendants. A letter or inquiry in response to a newspaper advertisement satisfied the statutory requirement in United States v. Hopkins, 357 F.2d 14 (6th Cir.), cert. denied, 385 U.S. 858, 87 S.Ct. 107, 17 L.Ed.2d 84 (1966). And the mailing of an I.R.S. interest-payment notice to legitimize a fictitious loan was considered integral to the pretense in United States v. Isaacs, 493 F.2d 1124, 1151 (7th Cir.), cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).

But a use of the mails that is not a step toward receipt of the fruits of the scheme is not covered by section 1341. United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed. 2d 603 (1974); Kann v. United States, 323 U.S. 88, 65 S. Ct. 148, 89 L.Ed. 88 (1944); Henderson v. United States, 425 F.2d 134 (5th Cir. 1970); Richardson v. United States, 150 F.2d 58 (6th Cir. 1945). In *Maze* the Supreme Court held a perpetrator of a classic credit-card swindle could not be prosecuted under section 1341. The delay in transmitting invoices was caused by distance rather than by the

mail service itself. Since the defendant would have preferred that the invoices never be mailed, the mailings could hardly be said to further his scheme.

With these precedents in mind, let us examine the role of the committee's notices of public hearings in defendant's scheme. The purpose of the notices was to provide an opportunity for affected persons to state objections to the proposed zoning changes. Yet Allen's testimony and the timing of the payments after committee approval was assured, imply that the zoning amendments had to go through before defendant would be paid. As in *Maze,* the purpose of the mailings conflicted with, rather than promoted, defendant's scheme to defraud.

In actual fact, the notices had little effect on the procedure of passing the amendments. They produced no witnesses at the Schaefer and Prokop-Zabrodski hearings.[12] One witness at the Harris hearing had received a notice. Two other witnesses identified themselves as adjacent owners, but their addresses were not on the notice list. All three objected to the zoning change.[13]

From either a theoretical or a factual point of view, the committee's mailing of notices seems too remote from defendant's scheme to support a conviction under section 1341.

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[12] There was one witness at the Schaefer hearing who was not on the notice list but who asked for an opportunity to talk with area residents before the committee passed on the amendment. He said that, based on what he had learned at the hearing, "I don't believe we would have any objection. . . ." (Gvn't Ex. 1-6.)

[13] These witnesses and the attorney representing Harris all believed Harris wanted a zoning amendment to operate a pillow factory, while the record shows Harris, Allen and defendant knew the amendment was necessary for construction of an animal hospital.

BLEED THROUGH

The government has three theories to truncate the remote connection between the mailings and defendant's scheme. The first is that the mailings would not have occurred if defendant had not agreed to support the amendments. This "but for" argument may show defendant "caused" the mailings, but is irrelevant to the purpose of the mailings.

The second theory is that the mailings contained misrepresentations. *See* United States v. Smothers, 435 F.2d 209 (7th Cir. 1970), cert. denied, 403 U.S. 906, 91 S.Ct. 2208, 29 L.Ed.2d 681 (1971); United States v. Williams, 424 F.2d 344 (5th Cir. 1970). These cases involved false bills of lading and fraudulent and misleading corporate reports. The government says the "latent" misrepresentation in the public-hearing notices is the impression that the committee will objectively consider the recipient's objections, when in fact the payoff to defendant has made the public hearing a sham.

Because the notices contained no false information as such, they are not in the same category as the mailings in *Smothers* and *Williams*. They are much more like the mailings in Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.E.2d 1277 (1960), and United States v. Brickey, 296 F.Supp. 742 (E.D.Ark. 1969), In *Parr,* school trustees mailed legitimate tax bills and receipts with the intention of misappropriating part of the collections. The Supreme Court held the mailings did not contain misrepresentations. In *Brickey* the mailings were routine letters among an insurance company, its independent agencies and its insureds. The government argued that, by allowing company routine to continue, its president was committing fraud because he knew the company was about to become insolvent through his own looting. The court held the

mailings were not fraudulent in themselves, were not misrepresentations of solvency under the circumstances and could not support a prosecution under section 1341.

The government's third theory is that the public-hearing notices "lulled" nearby residents, the most direct victims, into believing their due process rights were being respected when actually they had been subverted by defendant's scheme. The only cases that have accepted "lulling" letters to support mail fraud convictions have been instances of reassurances that were integral parts of the schemes in allowing the perpetrators to continue profitable relationships with their victims. United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 895, 21 L.Ed. 2d 790 (1969). Where, as here, the mailings are not used to conceal and continue a fraud, the "lulling" theory has been rejected. United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); Kann v. United States, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); Henderson v. United States, 425 F.2d 134 (5th Cir. 1970).

We conclude that section 1341 does not encompass defendant's scheme to defraud because the mailings were not made in furtherance of that scheme. The convictions on counts IV, V, VI and VII must be reversed.

III. *Voir Dire*

Defendant claims the district court erred in refusing to ask several questions of prospective jurors. These questions were proposed by defendant not to establish grounds for challenges for cause, but to provide guidance in the exercise of peremptory challenges.

BLEED THROUGH

[12] The first question was whether any of the panel had previously served on a jury. The district judge has the necessary discretion to decide whether to ask this question. United States v. Ruggiero, 472 F.2d 599 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973).

[13, 14] The second group of questions requested by defendant was designed to elicit more information about the prospective jurors' personal, social and associational backgrounds than the district judge's questions produced. After reading the transcript of the voir dire, we are satisfied that the background information obtained by the judge and by additional questioning by defendant reached the "happy mesne point" that provided "some basis for a reasonably knowledgeable exercise of the right to challenge." United States v. Lewin, 467 F.2d 1132, 1137 (7th Cir. 1972). We do not approve the judge's refusal to ask male jurors about their marital status and their spouse's occupations while asking female jurors the same questions, but such refusal does not rise to the level of reversible error.

[15] The next refused question was whether the prospective juror or his family member or close friend had ever applied for a job with the federal government. Defendant's argument is that an unsuccessful application would prejudice the venireperson against public officials in general. We do not accept this theory and believe the proposed question was irrelevant to the case.

[16, 17] The final unasked question was whether the prospective juror had ever taken a position with respect to any zoning change. The judge had already asked the panel whether they had ever tried to change the zoning

on property they owned and had explained the nature of the charges against defendant. There is no requirement that a matter "be explored in numerous substantially similar questions, with tedious repetitions, of only slightly variant shadings of meaning." United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972). The panel was adequately alerted to this possible area of prejudice.

Lewin and United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973), are two recent cases from this circuit finding error in the restriction of questioning on voir dire. In *Lewin* the two main witnesses were employees of the Better Government Association and the *Chicago Daily News*. The panel should have been asked whether they contributed to the BGA or were employed by either organization. In *Dellinger* the court refused to inquire into three areas in which conventional jurors were likely to be prejudiced against the unconventional defendants. Neither case provides a parallel for the thorough, detailed voir dire in the present case.

We wish to note our concurrence in Judge Campbell's concurring opinion.

The convictions on counts I, II, VIII and IX are affirmed.[14] The convictions on counts III, IV, V, VI and VII are reversed.

William J. Campbell, Senior District Judge (concurring).

I concur fully in Judge Sprecher's excellent opinion, and wish only to briefly state my own views with respect to defendant's contention that his actions constituted no more than the acceptance of a bribe, and that his conduct

[14] Counts VIII and IX, for filing false income tax returns, were not challenged on appeal except under the voir dire argument.

BLEED THROUGH

was therefore not extortionate in character. The government need not demonstrate that a defendant, charged with extortion under color of official right, has obtained the property of another through the use of force, duress, fear or the threat of same. The evidence need only demonstrate that the public official has obtained from the "victim" something of value to which the official is not entitled, in return for something that should have been provided without payment. The office held by the official provides the coercive impetus which generates the pay ment.

In the instant case, the alderman's duties included the objective and unbiased evaluation of applications for zoning variances. Staszcuk was paid money by virtue of his office as alderman so that the powers of that office would not be misused to the detriment of the payor, or at a minimum, to insure that the zoning application would receive the fair and unbiased consideration which it should have been afforded without the encouragement of additional compensation. Thus, the office provided the duress which rendered the acceptance of money by Staszcuk extortion under color of official right.

That is not to say, however, that, as the government contends in the instant case, there is no distinction between the acceptance of a bribe by a public official and extortion under color of official right. For example, assume that a public official has been paid a sum of money to induce him to use his position and influence to obtain a building permit on behalf of an applicant who is clearly not entitled under the law to such a permit. In such a case, the money which the public official receives is not being paid to prevent the coercive use of his office, but rather to assist the payor in his efforts to obtain something to which he is

not lawfully entitled. As the court stated in United States v. Pranno, 385 F.2d 387, 390 (7th Cir. 1967) "it might be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal. . . ."

Finally, contrary to the defendant's contention in the instant case, bribery and extortion are not necessarily mutually exclusive offenses. *Pranno, supra* at 390. A single payment may be made for more than one purpose, particularly where there exists some question regarding whether the payor is legally entitled to that for which he tenders payment. Where such is the case, the government need only prove the extortionate element of the transaction to support a charge of extortion under color of official right.

D THROUGH

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CASIMIR STASZCUK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division
No. 73 CR 249
Richard B. Austin, *Judge.*

Argued en Banc February 18, 1975—Decided May 16, 1975

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, STEVENS, SPRECHER, TONE and BAUER, *Circuit Judges.*

STEVENS, *Circuit Judge.* Count III of the indictment[1] charged that on December 8, 1970, appellant did obstruct,

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[1] The disposition of the remaining counts is explained in the panel opinion reported at 502 F.2d 875.

delay and affect commerce as defined in the Hobbs Act[2] by extorting $3,000 from a person named Allen.[3] The

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[2] Act of July 3, 1946, c. 537, 60 Stat. 420. The statute as codified in 18 U.S.C. § 1951, provides in pertinent part:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means . . . all . . . commerce over which the United States has jurisdiction."

[3] The charging paragraph in Count III of the indictment reads as follows:

"On or about December 8, 1970, at Chicago, in the Northern District of Illinois, Eastern Division,

CASIMIR STASZCUK,

the defendant, knowingly, wilfully and unlawfully did obstruct, delay and affect commerce, as defined by Section 1951(b)(3) of Title 18 of the United States Code, by means of extortion. More specifically, defendant, a public official, obtained property not due either him or his office, in the form of $3,000, paid partly by check and partly by cash, from Al C. Allen, with his consent being induced under color of official right. This payment was made because Allen believed and feared that he would be unable to procure a zoning change on property located on Pulaski Road betwen 56th Place and 57th Street, in the Thirteenth Ward of Chicago, unless he compensated defendant to refrain from objecting to such a change as a member of the Chicago City Council;

"In violation of Title 18, United States Code, Section 1951."

LEED THROUGH

government proved that defendant received the $3,000 and that he did not oppose a subsequent zoning change authorizing the construction of an animal hospital. However, no such hospital was ever built. Therefore, there is no evidence that either the zoning change or the payment had any effect whatsoever, either favorable or unfavorable, on interstate commerce. The question presented is whether the federal statute reaches this extortion.

The question is novel and significant. The extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but also contribute to the continuing transfer of power from the several states to the national government. Since we have no desire to accelerate this trend unnecessarily, we approach the question with a special regard for appellant's claim that the federal prosecutor has overreached the proper limits of his jurisdiction. The importance of the issue merited the fresh consideration of the court sitting en banc. It should be decided neither by simple extrapolation from the precedents on which the government relies nor by merely distinguishing the cases which have not yet carried us this far.

We first restate the essential facts and then explain why we believe that a fair consideration of the statutory purpose and its constitutional predicate require that the district court judgment be affirmed.

I.

In September, 1970, William Harris planned to build an animal hospital on property located in the 13th ward of the City of Chicago. As then zoned, such a use of the

land was prohibited. Harris therefore paid $5,500 to Al C. Allen, who had acquired a reputation as "the zoning man";[4] Allen talked to defendant Staszcuk, who was then serving as alderman of the 13th ward; on September 15, 1970 an amendatory ordinance was introduced in the City Council.

On December 8, 1970, the zoning man paid the alderman $3,000. On that date the alderman participated in the public hearing on the proposed ordinance, questioning objectors and, at least implicitly, supporting the proposal. Following the public hearing on December 8, pursuant to customary procedure, the zoning committee deferred action on the matter. A few weeks later, on January 27, 1971, the ordinance was approved by the committee and adopted by the City Council. Harris was thereafter free to construct his animal hospital.

In March, Harris received bids from three contractors. For reasons not explained in the record, however, the veterinarian apparently changed his plans and the hospital was never built. Instead, Harris improved his property with construction that would have been permitted before the zoning ordinance was amended.

The estimator for one of the three contractors testified that in his judgment construction of the animal hospital would have required the use of components manufac-

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[4] The witness Prokop referred to Allen as "the zoning man." (Tr. 174) When asked to explain how she heard about Allen, she stated that she had read about him in the papers and she went in to see him "because he was always zoning." (Tr. 177)

tured outside of the State of Illinois.[5] Neither of the other bidders testified. The nexus between the extortion and interstate commerce may therefore be described thusly: the extortion eliminated the alderman's possible opposition to the removal of a restriction which prevented Harris from building the hospital; if Harris had not changed his plans, the construction of the hospital would have involved the use of out-of-state materials. The jury found this nexus sufficient under the trial court's instructions on the commerce issue.[6] A panel of this court originally concluded that it was too tenuous and reversed the conviction on Count III. After reargument and reconsideration we now affirm that conviction.

II.

The present form of the statute is a codification of a 1946 enactment, the Hobbs Act, which amended the so-

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[5] Specifically, the contractor whose estimator testified would have used cast iron plumbing fixtures, plate glass, electrical fixtures, and a furnace manufactured elsewhere. Since the witness's testimony was predicated on his company's experience in the construction of four comparable animal hospitals in the preceding five years and his general knowledge of the industry, and since he was not aware of any Illinois sources for these items, the jury could fairly infer from the testimony that the other contractors would also have found it necessary to use components manufactured outside of Illinois.

[6] After explaining the meaning of "extortion under color of official right," the trial judge stated:

> "It is not necessary for you to find that the defendant Staszcuk knew or intended that his actions would affect, delay or obstruct commerce or the movement of any article in commerce; it is only necessary that the natural effect of the act committed by him, whether he was conscious of it or not, would be to affect, delay or obstruct commerce." (Tr. 585-586)

called "Federal Anti-racketeering Act of 1934."[7] The 1946 amendment was intended to encompass the conduct held to be beyond the reach of the 1934 Act by the Supreme Court in *United States* v. *Local 807*, 315 U.S. 521.[8] It was a broadening amendment concerned primarily with the proper differentiation between "legitimate" labor activity and labor "racketeering." It is, therefore, appropriate to consider the legislative purpose in enacting the 1934 Act in addressing the issue presented by this case.

That purpose was described in Judge Learned Hand's opinion for the majority of the Circuit Court of Appeals in the *Local 807* case as follows:

> In conclusion we may add that a consideration of the evil at which Congress was aiming, seems to us to confirm the construction we are putting upon what it said. For a number of years before 1934—at least in the City of New York—the levy of blackmail upon industry, especially upon relatively small shops, had become very serious, and the local authorities either would not, or could not, check it. The courts were powerless, because the witnesses were terrorized and could not be protected if they told what they knew; the public felt themselves at the mercy of organized gangs of bandits and became much wrought up over the situation. It was, at least primarily, to check such Camorras that Congress passed this measure.

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[7] The original statute is found at 48 Stat. 979-980, the 1946 amendment at 60 Stat. 420, and the 1948 codification at 18 U.S.C. § 1951.

[8] That case involved the construction of the exemption for "the payment of wages by a bona fide employer to a bona fide employee," which is no longer a part of the statute.

BLEED THROUGH

United States v. *Local 807*, 118 F.2d 684, 687-688 (2d Cir. 1941).

A description of the statute as designed to eliminate the "levy of blackmail upon industry, especially upon relatively small shops," casts a revelatory light on the problem presented by this case. An effective prohibition against blackmail must be broad enough to include the case in which the tribute is paid [9] as well as the one in which a victim is harmed for refusing to submit. Since the payment would normally enable the business to continue without interruption, [10] the inference is inescapable

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[9] Counts I and II of this case; and *Stirone* v. *United States*, 361 U.S. 212; *Nick* v. *United States*, 122 F.2d 660 (8th Cir. 1941), *cert. denied*, 314 U.S. 687; *Hulahan* v. *United States*, 214 F.2d 441 (8th Cir. 1954), *cert. denied*, 348 U.S. 856; *United States* v. *Floyd*, 228 F.2d 913 (7th Cir. 1956), *cert. denied*, 351 U.S. 938; *United States* v. *Pranno*, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944; and *United States* v. *Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, are examples of such cases. Speaking for our court in *Pranno*, Judge Fairchild stated:

> "The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce*. We have no doubt of its coverage here." 385 F.2d at 389 (Emphasis added.)

[10] Of course, the payment of the extortion demand may, in some cases, have a direct actual effect on interstate commerce by reducing the assets available for the purchase of goods originating in other states. *See, e.g., United States* v. *Gill*, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968; *United States* v. *DeMet*, 486 F.2d 816 (7th Cir. 1973), *cert. denied*, 416 U.S. 969; and *United States* v. Augello, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070. In this case, however, the government does not contend that the $3,000 payment so depleted the resources of either Allen or Harris.

that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect.

Moreover, congressional concern was not merely a matter of providing federal protection to each of the "relatively small shops" being victimized, but rather reflected the legislative judgment that these entrepreneurs, in the aggregate, represented a component of industry of sufficient importance to merit federal protection. The concern which gave rise to the statute is marketwide. Thus, although enforcement necessarily proceeds on a case-by-case basis, our evaluation of both the intent of Congress and its power to implement that intent, requires more than a consideration of the consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.[11]

The statute is not regulatory in character but instead is intended to remove artificial restraints on the free flow of goods. The elimination of "blackmail upon industry" can have no inhibitory effect on interstate commerce; it can only facilitate the operation of a free economy. Like the Sherman Act, which is broadly directed against private regulation of the free market, and which has been construed as an exercise by Congress of "all the power it possessed" to prevent restraints on commercial competition, see *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495, and *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 435, the purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself.

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[11] *Compare United States* v. *Walker,* 489 F.2d 1353, 1357 (7th Cir. 1973), *cert. denied,* 415 U.S. 982.

That central purpose was described in these words by Justice Rutledge:

> If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
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> As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treaties were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government.
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> * * *
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> So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.

W. Rutledge, A Declaration of Legal Faith, at 25-26 (1947).

The primary purpose of the Commerce Clause was to secure freedom of trade, to break down the barriers to its free flow, and to curtail the rising volume of restraints

upon commerce that the Articles of Confederation were inadequate to control. A statute which has a purpose which so unambiguously parallels the fundamental purpose of its constitutional predicate must receive an expansive construction.

It is, therefore, not surprising to find that the language of the statute, its legislative history, and its interpretation by the Supreme Court all confirm an intent by Congress to exercise its full powers under the Commerce Clause. The definition of the word "commerce" in the 1934 Act encompassed "all trade over which the United States has constitutional jurisdiction."[12] The Senate Report approvingly quoted a Department of Justice memorandum stating that the proposed statute was designed "to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers." *See* S. Rep. No. 532, 73rd Cong., 2d Sess. at 1 (1934). And, as has often been noted, in *Stirone* v. *United States*, 361 U.S. 212, 215, the Supreme Court expressly stated that the broad language of the Hobbs Act manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."

Against this background, we have no alternative but to conclude that Congress intended the Hobbs Act to apply to a case such as this and that it had ample power to effectuate that intent.

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[12] 48 Stat. 979. Moreover, in describnig the requisite effect on commerce, § 2 of the 1934 Act broadly referred to activity "in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce. . . ."

BLEED THROUGH

III.

There was no need to prove that the extortion was actually intended to obstruct or to affect interstate commerce. The commerce element of the Hobbs Act violation is jurisdictional. Recently the Supreme Court removed such doubt as theretofore existed about the prosecutor's burden of proving "anti-federal scienter." *See United States* v. *Feola*, 43 U.S.L.W. 4404 (U.S. March 19, 1975).[13]

We are also persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose.[14] Finally, we have no doubt that the extortion revealed by this record is a species of the "blackmail upon industry" which Congress mustered its

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[13] Speaking of 18 U.S.C. §§ 111 and 371, the Court stated:

"The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agrement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity."

43 U.S.L.W. at 4411-4412.

[14] See the cases in n. 9, *supra*.

full power to eradicate. The muscle of the faithless public servant is just as intolerable as the muscle of the Camorras described by Judge Hand.[15]

This does not mean, however, that we may ignore the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case.[16] We hold, however, that the commerce element of a Hobbs Act violation —the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce.[17] Congressional concern is justified

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[15] *Compare* Mr. Justice Clark's reference to "a betrayal of public trust of the most alarming type to a free society" in his opinion in *United States* v. *Braasch*, 505 F.2d 139, 141 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975).

[16] The language of this statute does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case. *Compare United States* v. *Hunter*, 475 F.2d 1019, 1020-1021 (7th Cir. 1973), *cert. denied*, 414 U.S. 857.

[17] The same conclusions apply to the Sherman Act. The federal interest in keeping the market free of artificial restraints justifies a prohibition against an agreement to fix prices even if the agreed price is reasonable, *see e.g., United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-401, and even if the agreement may result in a lower price in the particular case. *See e.g., Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213. Undoubtedly the illegality would attach even if the defendants could demonstrate that the prevailing price would have been the same without any such agreement. The federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results. *Cf. United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975).

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by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.[18]

The jurisdictional inquiry must, of course, focus on the situation at the time of the offense. In this case the crime occurred on December 8, 1970. No actual effect on commerce occurred either before or after that date. It was, nevertheless, entirely reasonable for the jury, assessing probabilities as of that time, to find that a potential effect on commerce had been proved. The jury could reasonably infer that, as a result of the extortion on that date, there was then a likelihood that the movement across state lines of a furnace, plate glass, and plumbing and electrical fixtures would be affected. The events which occurred after December 8, 1970, the evidence concerning the interested parties' plans and expectations, and the contractor's testimony about the need to use out-of-state components to build an animal hospital in Illinois were all relevant to the commerce issue. Contrary to the prosecutor's view, however, we do not think appellant's guilt or innocence may be determined entirely on the basis of the intent of the property owner or the zoning man; nor, on the other hand, do we think federal jurisdiction is defeated by the fortuitous circumstance that, after the crime had been committed, a change of plans occurred and

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[18] The instruction in this case required the jury to find that the "natural effect" of the transaction would be to affect commerce. *See* n. 6, *supra*. We find no significant difference between that phrasing and a test phrased in terms of a "realistic probability" of such an effect.

the hospital was never built.[19] Finally, contrary to appellant's argument, even though it is possible that another contractor might have been able to construct the hospital entirely with local materials, the testimony was adequate to support the conclusion that the use of out-of-state components was far more probable. The jury, like Congress, was entitled to assess probabilities.

The jury was properly instructed on the commerce issue and its verdict is supported by the evidence. The conviction on Count III is affirmed.[20] For the reasons stated in the panel opinion of September 10, 1974, the convictions on Counts IV, V, VI, and VII are reversed and the convictions on Counts I, II, VIII and IX are affirmed.

SPRECHER, *Circuit Judge,* dissenting.

The court *en banc* has let stand the original panel decision affirming the convictions on Counts I, II, VIII and IX and reversing the convictions on Counts IV, V, VI and VII. *United States* v. *Staszcuk,* 502 F.2d 875 (7th Cir. 1974).

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[19] Nor would appellant have been any less culpable if for some unanticipated reason the ordinance had not in fact passed on January 27, 1971. Conversely, if on December 8, 1970, no effect on interstate commerce had been foreseeable, a subsequent decision creating an interstate nexus would not retroactively convert a possible state offense into a federal crime.

[20] At appellant's request we have again reviewed the transcript of the voir dire examination of prospective jurors. Although we adhere to our original conclusion that the entire examination brought out sufficient information about the seven male jurors (and one male alternate) who were accepted to enable experienced defense counsel to make a reasonably knowledgeable use of their peremptory challenges, we repeat our disapproval of the trial judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses.

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Count III, which the panel reversed, has now been affirmed by a majority of the *en banc* court. Inasmuch as the original opinion will retain viability in regard to eight counts, no purpose would be served by repeating the reasons stated therein for originally reversing Count III.

Therefore, I respectfully dissent from the *en banc* affirmance of Count III on the grounds set forth in 502 F.2d at 879 and would reverse that Count.

SWYGERT, *Circuit Judge,* dissenting.

I concur in Judge Sprecher's dissent. I also dissent from the court's opinion on another ground: the trial judge's handling of the voir dire examination of the prospective jurors.

Judge Stevens, writing for the majority, treats the matter in footnote 20 of his opinion. There he says that upon reviewing the record the court adheres to the original conclusion that the entire examination brought out sufficient information for peremptory challenge purposes, but that the court disapproves "the trial judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses." Although the court voices its disapproval, there is no consequence. Apparently the error is chalked up as harmless. This flaw in the examination, along with others I shall mention, was not harmless error in my opinion. Certainly enough has been said by this circuit to make clear to the trial bench the necessity of an adequate voir dire examination and the danger of truncated, hurried procedures which may mitigate against the selection of unbiased, qualified jurors. *United States* v. *Lewin,* 467 F.2d 1132 (7th Cir. 1972); *United States* v. *Dellinger,* 472 F. 2d 340 (7th Cir. 1972).

As we indicated in *United States* v. *Lewin* the voir dire examination should include questions that go beyond what may bring out information that could be the basis for a challenge for cause. It should also include questions relevant to the nature of the case and the indentity of the parties that might establish the basis for an informed, intelligent peremptory challenge. Otherwise, the right to exercise challenges peremptorily would be useless. As this court said in *United States* v. *Dellinger:* "[If] this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges. . . ." 472 F.2d at 368.

With these pronouncements in mind, how can it be said that information that a prospective juror has previously served as a petit or grand juror in criminal matters is not relevant background for making a peremptory challenge decision. Yet the trial judge here refused to ask the relevant question. As the defendant argues, the failure of the jurors, upon being asked, to express any reason why they could not fairly and impartially try the case might not alert them to unperceived prejudice or bias that previous jury service may have created in their minds. *Cf. United States* v. *Martin*, 507 F.2d 428 (7th Cir. 1974).

Furthermore, the refusal of the trial judge to inquire about the length of residence of the jurors at their present addresses and about their residence immediately prior thereto deprived the defendant of relevant information concerning the social background of the jurors.

Finally, the trial judge did not ask a question concerning a highly relevant aspect of the jurors' possible experience with zoning matters. He did frame the following question to them:

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> Now we are going to see if we can find out whether any of you have ever had any property in which there was some discussion, or maybe more than a discussion, in regard to changing the zoning regulations in regard to this property, and again I see no hands raised, so I am assuming that none of you have ever had property where you had any desire to have the zoning changed.

But more should have been asked. Inquiry should have been made, as defendant requested, as to whether any of the jurors had ever resisted or taken a "position" with respect to any proposed zoning change. Some juror may have had experience, good or bad, with a zoning request that did not affect his real estate directly but did affect indirectly his interests either as an adjacent property owner or a nearby resident. Such information could have been the basis for a peremptory challenge.

A meaningful opportunity for the defendant to exercise his right to peremptory challenges was thus thwarted by the trial judge. The Government argues in its brief:

> In this case, as in all cases, the *voir dire* could have been more elaborate and penetrating. But if the overcrowded criminal docket in this jurisdiction is not to buckle under its own weight, a trial judge who, on the facts presented, does not impinge upon the essential demands of fairness must be accorded leeway in determining when the *voir dire* has produced a fair jury capable of just judgment.

In the first place there was an impingement upon the essential demands of fairness. Secondly, overcrowded criminal dockets are no excuse for such impingement. Given an overcrowded docket, other means could have been utilized to accommodate the need to save time and yet afford fairness. For example, a questionnaire, formulated at a pretrial conference, which would have covered most if not all the relevant questions, could have been furnished

the prospective jurors before they were called into the courtroom. Regardless of such suggested solutions, short-cut procedures, as here, do not comport with fair trials. I would reverse and remand for a new trial.

PELL, *Circuit Judge,* dissenting. Count Three of the indictment charged that Casimir Staszcuk "did obstruct, delay and affect commerce" . . . "by means of extortion" in violation of 18 U.S.C. §1951. The statute which was the basis of the indictment reads in pertinent part: "Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion. . . ." The evidence adduced by the Government at the trial showed affirmatively that Staszcuk did not obstruct, delay, or affect commerce by the transactions charged in Count Three. Nevertheless, he was convicted on this Count and now a majority of this court, although conceding that the Count Three activity had no effect whatsoever on interstate commerce, have affirmed the conviction. I respectfully dissent from the result reached and while concurring in the dissenting opinion of Judge Sprecher, because of what I regard as a substantially incorrect extension of federal jurisdiction into a localized crime, I feel impelled to add the following comments.

The net effect of the majority decision is to construe the statute to read: "Whoever in any way or degree potentially obstructs, delays, or affects commerce, even though he does not actually obstruct, delay, or affect commerce. . . ."

The majority despite its scholarly consideration of what it deems Congress probably intended as the scope of its exercise of constitutional power to regulate commerce, ignores that which Congress did in fact enact. In the recent case of *Burns* v. *Alcala,* No. 73-1708, 43 U.S.L.W. 4374, 4376 (March 18, 1975), the Supreme Court referred

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to the "axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." The ordinary meanings of the jurisdictional words, "obstruct, delay, and affect," as detailed in dictionaries of the English language all appear to import the concept of accomplishment, a *fait accompli* rather than a *fait potentiel.*[1] I do not find persuasive reasons for ignoring the ordinary, the plain and explicit, meanings of these key words by equating the breach of trust of a public official which has no actual effect upon commerce and which does not delay or obstruct commerce, as reprehensible as that misconduct may be, with the widespread racketeering at which Congress intended to direct its enactment. I do not read the history quite as does the majority. It seems rather clear to me that Congress was not so much interested in removing artificial restraints on the free flow of goods as it was in striking down an evil which "had become very serious, and the local authorities either would not, or could not, check. . . ." *United States* v. *Local 807*, 118 F.2d 684, 687-688 (2d Cir. 1941). That the Hobbs Act which was aimed at a specific evil, is sufficiently broad to catch in its net other extortionists whose nefarious activities do in fact affect commerce does not signify to me an intention on the part of Congress, even if Congress has the constitutional power which is not at all clear, to extend the exercise of legislative power to local activities which have no effect whatsoever on interstate commerce. The determination of whether to prose-

[1] For example from Webster's Third International Dictionary: *affect*—"to produce an effect . . . to produce a material influence upon or alteration in"; *delay*—"to cause to be slower"; *obstruct*—"to block up . . . to be or come in the way of . . . to cut off from sight."

cute federally what is essentially a local crime when it has some minimal connection with interstate commerce is a matter of prosecutorial policy with which the courts do not ordinarily concern themselves. We are, however, not dealing with a question of prosecutorial policy but rather prosecutorial power which I deem to be lacking.

The portion of the statute which would reach nearest to the applicability point here is "affect commerce." That phrase is not a stranger to other legislation, thus, in the National Labor Relations Act we find the Board being empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. §160(a).

The use of the word "affect" in the analogous NLRA situation and recognition that Congress intended to indicate the fullest employment of its commerce power authority is discussed in the *en banc* opinion in *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F.2d 829, 831-32 (3d Cir. 1941), *cert. denied*, 314 U.S. 693:

> "The National Labor Relations Act uses what have been described as words of art to indicate the fullest employment of this Congressional authority. The selection of the word "affect" is of recent origin. Although it appears in the language of some of the earlier Supreme Court opinions, it only found its way into relatively new legislation, and so is not present in such statutes as the Federal Trade Commission, the old Employers' Liability Act, and the Sherman Act. They qualify interstate commerce with such words as 'in', 'engage in' or 'restraint', whereas such modern statutes as the National Labor Relations Act, the Bituminous Coal Act, and the new Employers' Liability Act, prefer the more vehement 'affect'. That the word has the widest conceivable scope is apparent both from its dictionary definition and its judicial interpretation. The dictionary says: 'To act up-

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> on; produce an effect on; touch', and the cases are equally unanimous in emphasizing this inclusive character and so hold it to mean 'acting upon', 'working a change in' or 'concerning'." (Footnotes omitted.)

That there must be some effect on commerce even though small would appear to be the underlying premise of the Supreme Court's position on the National Labor Relations Act, and I am unaware of any basis for differentiating the Hobbs Act.

> "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley* v. *Kansas City Southern Ry. Co., supra* [187 U.S. 617, 619] The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.
>
> "The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved. Section 2(6) defines commerce as 'trade, traffic, commerce, transportation, or communication among the several States,' without reference to its volume, and declares in subsection (7) that .'The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'

Section 10(a) confers on the Board authority 'to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606-607 (1939).[2]

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[2] The *de minimis* concept, which by definition would seem to require some effect and which would likewise appear to preclude a jurisdictional basis of no effect at all, was given consideration by this court in the case of *Community Currency Exchange, Inc.* v. *National Labor Relations Board,* 471 F.2d 9, 41-42 (7th Cir. 1972):

"It is true, however, as the company urges here, that the Board's broad jurisdiction is limited by the *de minimis* doctrine. The *de minimis* concept, as enunciated in *NLRB* v. *Fainblatt,* 306 U.S. 601 607, 59 S.Ct. 668, 83 L.Ed. 1014 (1939), operates to deny federal jurisdiction where a business's effect on commerce is so negligible that for jurisdictional purposes the enterprise is considered purely local. Although the concept is not susceptible to a mechanical application based upon a business volume formula, the Third Circuit has held that "*de minimus* in the law has always been taken to mean trifles—matters of few dollars or less." *NLRB* v. *Suburban Lumber Co.,* 121 F.2d 829, 832 (3d Cir. 1941). We adopted that reasoning in *NLRB* v. *Aurora City Lines, Inc.,* 299 F.2d 229, 231 (7th Cir. 1962). We do not deem the exchanges' effect on commerce trifling, either from the standpoint of dollar amount or business impact."

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Here the question is not great or small; it is, putting it very simply, some or none. In the language of *Fainblatt,* I can perceive no basis for inferring an intention of Congress to make the operation of the Hobbs Act independent of any effect whatsoever on interstate commerce. Since the ordinary meaning of the words used would indicate that Congress had no such intention, it is, of course, unnecessary to reach the constitutional question of whether Congress would have the power to reach beyond the boundary imposed by a complete lack of any commerce nexus.

The Government in arguing that potential effect on interstate commerce is sufficient relies on *United States* v. *Pranno,* 385 F.2d 387 (7th Cir. 1967), *cert. denied,* 390 U.S. 944; *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. (1971), *cert. denied,* 404 U.S. 1058; *United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir. 1954), *cert. denied,* 348 U.S. 856; and *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070.

While language in these cases might suggest potential effect was sufficient, the language does not appear to have been necessary to the courts' holdings, although, of course, for the reasons I have indicated herein, to the extent that it was necessary to a holding I believe it incorrect. In *Pranno,* the defendants told the victim that a building permit would not be issued unless the victim paid them $20,000. Apparently some building material from other states had already been brought into Illinois at the time of the extortion. This court held that there was sufficient connec-

tion with interstate commerce. "Withholding the building permit would delay construction and the beginning of production. The interstate movement of building materials, raw materials, and finished goods would be correspondingly delayed. . . . The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce." 385 F.2d at 389. The extortion money was paid so that the interstate movement of the goods, in fact, continued.

In *Hyde,* the defendants, including the Attorney General of Alabama, conspired to extort payments from life insurance companies and small loan companies. On appeal, the defendants argued that some of the companies were not engaged in interstate commerce at the time of the extortion. The Fifth Circuit held that the Hobbs Act nevertheless applied: "The companies were formed, and registration for a stock sale was sought, with a stated purpose of going into the activities that support a finding of interstate commerce. Neither the statute nor the Constitution requires that the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." 484 F.2d at 836. All of the companies did eventually engage in interstate commerce.

In *Tropiano,* the defendants, who were engaged in the rubbish collection business, threatened other persons who were involved in the same business with violence if they did not stop soliciting business in the city in which the defendants operated. The victim eventually agreed not to solicit any of the defendants' customers or any further business in the city. At the time of the threats, the victim employed trucks and containers which were manufac-

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tured in another state. The Second Circuit held that there was sufficient connection with interstate commerce for the Hobbs Act: "[The victim's] surrender of his right to solicit additional customers in Milford automatically limited his future orders for receptacles for new customers and the trucks required to serve such customers." 418 F.2d at 1076.

In *Hulahan,* the defendant, a representative of a local labor union, attempted to extort and extorted money from three construction companies by threats of labor trouble. Two of the companies were dependent, for the continuation of the work undertaken by them, upon equipment, materials, and supplies from other states. The third company was working on the construction of runways at the St. Louis Municipal Airport. The Eighth Circuit held that there was sufficient connection with interstate commerce for the purposes of the Hobbs Act since the companies were dependent upon interstate commerce for materials, etc. or were engaged in construction facilities to serve interstate commerce.

In *Augello,* the Second Circuit held there was sufficient nexus with interstate commerce since the depletion of the victim's resources, due to the extortion payments, affected the victim's purchase of goods from interstate commerce. The evidence indicated that the victim purchased supplies from another state at the time of the extortion.

In sum, this court is squarely holding in a case, really of first impression, that the Hobbs Act has eliminated the necessity of actual effect on interstate commerce so long as it reasonably appeared at the time of the extor-

tion that there would be such effect. I cannot agree that Congress intended such an extension. [3]

Although I did approve of and concur in the opinion of the panel of this court when the case was first heard, since the matter has been before the court for reconsideration via the *en banc* route, I have reexamined the matter of the voir dire on the basis of the record and in the light of Judge Swygert's dissenting opinion. I am persuaded that the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the appellant a fair trial. I therefore join in the dissent of Judge Swygert.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] While perhaps not dispositive of the legal issue presented by Count Three, two collateral policy reasons suggest themselves for the view of the lack of necessity for straining to find that Congress did extend itself to the extent that the majority opinion finds it did.

(1) In a period of constant study of the problems presented by the overload of cases in the federal courts, and the suggested elimination of some types of jurisdiction, e.g., diversity cases, a limitation on the sweep of jurisdictional claims into local cases might be pertinent for consideration.

(2) The Hobbs Act defendant is quite frequently guilty of other federal violations as to which there is no question. Most frequently it is found for understandable reasons that the amount received has not been reported on income tax returns, thereby presenting a tax evasion case. Also, the Hobbs Act defendant may not have confined himself to one act of extortion but may have engaged in several other such acts as to which there was no question of effect on commerce. This aspect, of course, is not persuasive if the prosecutorial effort is to demonstrate by "throwing the book" that the defendant is guilty of multiple crimes.

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APPENDIX C

OPINION BY JUDGE STEVENS
Judges SWYGERT, PELL and SPRECHER *dissenting*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 16, 1975

BEFORE

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

No. 73-1869

United States of America,

Plaintiff-Appellee,

vs.

Casimir Staszcuk,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed In Part And Reversed In Part, in accordance with the opinion of this court filed this date.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1579

CASIMIR STASZCUK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel decision of the court of appeals (Pet. App. A) is reported at 502 F. 2d 875. The *en banc* decision of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1975 (Pet. App. C). The petition for a writ of certiorari was filed on June 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's *voir dire* examination of prospective jurors was sufficient to permit the intelligent exercise of peremptory challenges.

2. Whether an Alderman who accepts payments in return for his not opposing zoning changes in his Ward may be convicted of extortion under color of official right under 18 U.S.C. 1951.

3. Whether the showing of a potential effect on interstate commerce by an extortionate payment is sufficient to satisfy the interstate commerce requirement of 18 U.S.C. 1951(a).

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of extortion under color of official right, in violation of the Hobbs Act (18 U.S.C. 1951(a)), four counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of having filed false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to a term of eighteen months' imprisonment on each count, the sentences to run concurrently. The court of appeals, in a panel decision, reversed the conviction on the third Hobbs Act count and on the four mail fraud counts and affirmed as to the four remaining counts (Pet. App. A, pp. 1–15). Rehearing the case *en banc,* the court of appeals reversed the panel decision as to the third Hobbs Act count, thus affirming petitioner's conviction on that count, and affirmed the panel decision as to all other counts (Pet. App. B, pp. 16–41). The net result of the *en banc* decision was that petitioner's convictions on the three Hobbs Act counts and the two income tax counts were affirmed and the convictions on the four mail fraud counts were reversed.

1. Petitioner, an Alderman of Chicago's Thirteenth Ward, was charged in a nine-count indictment predicated upon his acceptance of various payments to insure the approval of zoning changes on property located in his Ward. Counts one through three charged petitioner with accepting three separate $3,000 payments from Al C. Allen, a zoning consultant, to refrain from objecting to proposed zoning changes on

four different parcels of land. These payments were alleged to have been induced "under color of official right" in violation of 18 U.S.C. 1951. Counts four through seven charged petitioner with causing the mails to be used in order to further a scheme to defraud the citizens of Chicago through his acceptance of these payments, in violation of 18 U.S.C. 1341. The final two counts charged petitioner with having knowingly filed false income tax returns by failing to report two of the $3,000 payments and half of the third payment, in violation of 26 U.S.C. 7206(1).

In Chicago, the procedural machinery for a zoning change is begun by the filing of a form application and an accompanying filing fee with the City Collector. The application is then introduced in the City Council and referred to its Committee on Building and Zoning. This Committee, composed of Aldermen selected by the Mayor, schedules a public hearing on the matter and its representatives mail notices of the hearing to property owners living within one hundred fifty feet of the site of the proposed zoning change (Tr. 87–90).[1] Approximately fifteen days after the notices are sent, the public hearing is conducted before the full Committee (Tr. 95–96).

An evaluation by the independent Development and Planning Commission also has some bearing on the Committee's ultimate decision. However, although the Committee generally follows the Planning Commis-

[1] "Tr." refers to the transcript of the trial proceedings. "A." refers to the transcript of the testimony of Al C. Allen whose testimony at trial was transcribed daily and is thus in separate volumes from the rest of the trial transcript.

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sion's recommendation, the Commission's view is usually not adopted if the Alderman in whose Ward the property is located strongly disagrees with that recommendation (Tr. 118–119, 130–131).

2. Charles Schaefer, a builder who owned some vacant property in the Thirteenth Ward that he desired to have rezoned in order to construct some apartment buildings, contacted Al C. Allen, a zoning consultant, who also served as a precinct captain in petitioner's Ward (A. 3–6, 54), because Allen's zoning service was "common knowledge among builders," and it was "quite difficult" for individual builders to secure zoning changes (Tr. 147–148, 155, 158). Allen promised a full refund of any amount paid if the zoning change was not approved (Tr. 163).

Thereafter Allen met with petitioner in Chicago's City Hall and asked him if he had any objection to the proposed zoning change. Petitioner indicated that he would look into the situation and get back to Allen in a few days. When he did so, Allen stated that if the zoning change were approved, petitioner would receive $3,000 (A. 8–11).

Petitioner filed for the Schaefer zoning change as a Ward matter on June 26, 1968 (Tr. 103–104).[2] Thereafter, Allen advised Schaefer that he could facilitate the desired change and Schaefer gave him a $5,000 check for "rezoning services" (Tr. 149–150; Gov't Ex. 2–1).[3] At the public hearing held on the

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[2] Because the application was filed as a Ward matter, the $100 filing fee was waived (A. 12; Tr. 88).

[3] Allen considered the fair market value of his own services to be approximately $2,000 per zoning change (A. 31–32).

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matter petitioner argued in support of the zoning change and responded to various citizen objections (Gov't Ex. 1–6).[4] The proposed change was approved by the City Council Committee on Building and Zoning on December 17, 1968 (A. 13). On that same day Allen cashed a check made out to himself for $3,000 which bore the notation "79th & Knox, Schaefer-Casey Staszcuk," and gave the cash to petitioner (A. 13–14; Tr. 206; Gov't Exs. 7–1, 9–1). Allen testified that he gave the cash to petitioner because he "wasn't going to get any resistance on the zoning matter and [Staszcuk] had no objection to it" (A. 17). After the zoning change was approved Schaefer constructed apartment buildings using materials that came from other states (Tr. 343–345; Gov't Exs. A–4 to A–19).

3. Anne Prokop and Steve Zabrodski also owned land in the Thirteenth Ward that they desired to have rezoned in order to build apartment buildings (Tr. 172–173, 179–181). Mrs. Prokop and Zabrodski's son each approached Allen to secure zoning changes. Allen received $2,500 from each of them in early December, 1969 (Tr. 173–175, 181–184; A. 17; Gov't Exs. 3–2, 5–1).

After obtaining petitioner's approval, Allen personally filed the rezoning applications on December 9, 1969 (A. 18, 90). On March 18, 1970, the day before the scheduled public hearing on the matter, Allen

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[4] At the hearing petitioner stated that Schaefer had been present but had to depart early (Gov't Ex. 1–6). At trial Schaefer testified that he did not recall having attended the hearing (Tr. 160–161).

drafted separate $2,000 and $1,000 checks made payable to himself (A. 19; Gov't Exs. 7–2, 7–3). The public hearing was held the next day and Committee approval was immediately granted (Tr. 112). Allen then gave petitioner an envelope containing the $3,000 because "he didn't resist the zoning amendment change" (A. 18–20; Tr. 206–207; Gov't Exs. 9–2, 9–3). Allen stated that the payment was necessary because he believed that "if the Alderman was against the zoning amendment, [he] wouldn't get it" (A. 21). Thereafter, the City Council approved the Committee's recommendation (Tr. 112), and Prokop and Zabrodski constructed apartment buildings on the rezoned properties using materials from out of state (Tr. 345–348).

4. In the summer of 1970, William Harris desired a zoning change for property owned by him in the Thirteenth Ward so that he could build a complex, which would include an animal hospital. His attorney told him that it would be practically impossible to get the zoning change (Tr. 188–189). Upon hearing of Allen's ability to obtain zoning changes, Harris, through an intermediary named Tim Spangler, contacted Allen and obtained his assurance that he could get the zoning change approved. Harris then gave Spangler a check for $5,500 (Gov't Ex. 6–1) to be given to Allen and in return Allen prepared an application form for Harris' signature (Tr. 194–196; A. 86, 92–93).

Since it was Allen's policy never to accept a customer's check until he had received "the authorization

and the okay" (A. 47–49),[5] he talked to petitioner a week before filing the Harris application. In response to Allen's inquiry concerning his objections to the proposed change, petitioner said he would "check it out and let [him] know." Upon being advised by petitioner that there would not be any objection, Allen filed the application on September 16, 1970 (A. 23–24, 71).

On the day before the scheduled hearing on the matter, Allen cashed a check for $1,550 and drafted a $1,500 check to cash (A. 25; Gov't Exs. 7–4, 7–5). At the hearing before the Zoning Committee, petitioner cross-examined the representative of homeowners who opposed the change (Gov't Ex. 1–16). After the hearing, Allen gave petitioner $1,500 in cash and the $1,500 check "because he didn't resist the zoning change" (A. 26–27; Tr. 208, 231–232; Gov't Exs. 8–2, 8–3, 9–4). On January 27, 1971, the Committee approved the zoning change and the City Council followed suit (Gov't Ex. 1–15). However, the veterinarian who had contacted Harris about building the animal hospital reneged on the deal even though Harris had solicited bids on the project and made financial arrangements. Thereafter, Harris constructed retail stores, which could have been built prior to the zoning change (Tr. 192–193). A representative of one of the construction companies who bid on the animal hospital testified that it could not have been built without using materials from out of state (Tr. 289–297).

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[5] By obtaining prior approval, Allen was able to provide his clients with money-back guarantees (Tr. 163, 198).

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5. Petitioner's federal income tax return for 1968 did not reflect the $3,000 from Allen with respect to the Schaefer zoning change (Gov't Ex. 17–1). His 1970 return failed to include the $3,000 from the Prokop-Zabrodski transaction and the $1,500 from the Harris zoning change (Tr. 248; Gov't Ex. 17–2).

ARGUMENT

1. Petitioner contends that the *voir dire* of prospective jurors conducted by the trial court was inadequate to allow petitioner intelligently to exercise his peremptory challenges because the court refused to ask: (1) whether any juror had ever "taken a position" with respect to zoning changes; (2) the length of the jurors' residence at their present addresses and their immediately preceding addresses; (3) the marital status of male jurors and the employment status of their wives; (4) with whom prospective jurors lived and those persons' employment; and (5) whether any jurors had previously served on a petit or grand jury in a criminal case.

Subject to the essential demands of fairness, the trial court has broad discretion in determining what questions to ask prospective jurors on *voir dire* examination. *Ham* v. *South Carolina,* 409 U.S. 524, 527–528; *Aldridge* v. *United States,* 283 U.S. 308, 310; *United States* v. *Smaldone,* 485 F. 2d 1333, 1347 (C.A. 10), certiorari denied, 416 U.S. 936 and *sub nom. Hanners* v. *United States,* 416 U.S. 951. The record indicates that the trial court conducted a thorough *voir dire* with questions designed to elicit information regarding prospective jurors' backgrounds and their ability

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to be impartial. After addressing the entire jury panel on the general issues of their duty of impartiality, the nature of the charges, the burden of proof, the functions of judge and jury, and the presumption of innocence (Tr. 11–21), the court asked more specific questions such as whether they were prejudiced against petitioner because he was an Alderman, whether any of the jurors had been active in politics or held a political job, and whether any juror had friends or relatives who had worked for any law enforcement agencies, including the Internal Revenue Service (Tr. 21–24). The court also asked whether any jurors had ever owned property that was the subject of discussion or conflict concerning a zoning change (Tr. 21). Finally, the court questioned prospective jurors individually as to their names, residence, occupations, and the location of their employers, and, in the case of female jurors, their marital status and husbands' occupations (Tr. 30–44). As counsel exercised their challenges the court would ask each new prospective juror these various questions (Tr. 48–52, 57–79). Petitioner exercised seven of his ten peremptory challenges, the government four, and one juror was excused for cause.

The *voir dire,* consisting of more than sixty pages of the record, provided sufficient information to permit petitioner's counsel to exercise intelligently his challenges. The questions presented by petitioner's counsel would have produced no significant information about the suitability of the prospective jurors, while at the same time such questioning would have

consumed an inordinate amount of time and confused the jurors about the relevant issues in the case. See *United States* v. *Workman,* 454 F.2d 1124, 1128–1129 (C.A. 9), certiorari denied, 409 U.S. 857).

The court's refusal to ask prospective jurors whether any had previously taken a position on a zoning matter was not an abuse of discretion. The trial court had already inquired whether any prospective juror owned property that had been the subject of discussion or conflict concerning a zoning change. This, taken in conjunction with general questions concerning prejudice, bias, and impartiality, was sufficient to elicit any preconceived opinions created by past experiences in zoning matters. The court was not required to put its questions in any particular form or to ask several questions on the same subject merely because it was requested to do so by petitioner. *Ham* v. *South Carolina, supra,* 409 U.S. at 527.

Nor did the court's refusal to ask the background questions concerning residences, living partners, and marital status of males violate the essential demands of fairness. While the court of appeals, in approving the overall *voir dire,* expressed its disapproval of the failure to inquire into the marital status of male jurors (Pet. App. A, p. 12; Pet. App. B, p. 29, n. 20), this refusal to so inquire does not rise to the level of a constitutional violation. Cf. *Hamling* v. *United States,* 418 U.S. 87, 139–140; *Ham* v. *South Carolina, supra,* 409 U.S. at 528. Finally, the court did not abuse its discretion in failing to inquire into the jurors' past experience on petit or grand juries.

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United States v. *Ruggiero,* 472 F. 2d 599, 606–607 (C.A. 2), certiorari denied 412 U.S. 939; *Deck* v. *United States,* 395 F. 2d 89, 92 (C.A. 9); *Bellard* v. *United States,* 356 F. 2d 437, 439 (C.A. 5).

2. Petitioner next contends that his acceptance of payment for not opposing zoning changes in his capacity as an Alderman, does not constitute extortion "under color of official right." This contention relates to the first three counts upon which petitioner was convicted. His sentences on these counts run concurrently with the sentences on the last two counts (the false income tax return counts), which petitioner does not challenge aside from his attack on the *voir dire* of prospective jurors. Thus, if our position regarding the sufficiency of the *voir dire* is correct, it is unnecessary for this Court to consider petitioner's challenge to the convictions on the first three counts. *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16. In any event, this contention regarding the Hobbs Act counts is without merit.

On this issue we rely in part on the panel decision of the court of appeals. As the panel stated in discussing the evidence presented (Pet. App. A, p. 4):

> The government presented sufficient evidence of an alderman's influence [footnote omitted] over zoning applications in his own ward that the jury could conclude [petitioner's] official functions encompassed the unbiased consideration and treatment of all zoning applications. The payments were made to [petitioner] to influence his exercise of the political power he

> held as alderman over zoning applications. To accept money in return for an agreement not to oppose such applications—in effect to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right. * * *

As the panel recognized, the evidence belies petitioner's claim (Pet. 23) that the money he received from Allen was not related to his official functions. Rather, it was given to assure petitioner's suspension of individual judgment, in his capacity as a public official, on the merits of the proposed zoning changes. The motivation of these payments focused on petitioner's office and it is this wrongful use of public office that is prohibited by 18 U.S.C. 1951, which proscribes extortion under color of official right. *United States* v. *Mazzei,* C.A. 3, No. 75–1357, decided July 29, 1975, slip op. pp. 10–11; *United States* v. *Braasch,* 505 F. 2d 139, 151 (C.A. 7), certiorari denied, Nos. 74–764, 74–781, 74–782, 74–5752, April 14, 1975; cf. *United States* v. *Classic,* 313 U.S. 299, 326; *United States* v. *Senak,* 477 F. 2d 304, 306–307 (C.A. 7), certiorari denied, 414 U.S. 856.

Petitioner urges that common law must be consulted in the absence of a special congressional definition of the term to define extortion under color of official right (Pet. 23). At common law extortion was a crime that could only be committed by a public official. And as this Court stated in *United States* v. *Nardello,* 393 U.S. 286, 289:

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> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion.

See, also, Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion,* 3 Seton Hall Law Review 1 (1971). As the plain language of the statutory definition of extortion indicates, *supra* at p. 2, Congress included common law extortion within the definition of extortion under the Hobbs Act. See *United States* v. *Kenny,* 462 F. 2d 1205 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States, et al.,* 409 U.S. 914.

The trial court's instruction conformed to this definition (Tr. 585) and the evidence supported the verdict on these counts. The fact that petitioner's conduct may also have constituted bribery is of no consequence. *United States* v. *Braasch, supra.*

3. Petitioner finally contends that as to count three no effect on interstate commerce was proven because the animal hospital was never built and the buildings that were built could have been built prior to the zoning change. We again note that it is unnecessary for this Court to consider petitioner's challenge to the conviction on this count in light of the concurrent sentences he received. *Barnes* v. *United States, supra.* In any event, this contention is unpersuasive.

As regards this issue, we rely primarily on the *en banc* decision of the court of appeals. After discussing

(1) the purpose of the Hobbs Act to eliminate the "levy of blackmail upon industry * * *" and remove artificial restraints on the free flow of commerce (Pet. App. B, pp. 21–23), (2) the fact that the Act's purpose "parallels the central purpose of the Commerce Clause itself" (*id.*, at p. 23), and (3) Congress' intention in passing the Act to use its constitutional power to regulate commerce to its fullest extent (*Stirone* v. *United States,* 361 U.S. 212, 215) (Pet. App. B, p. 25), the court below held that the Act was intended to cover instances such as that presented here where, at the time of the extortion, there existed a potential effect on interstate commerce.[6] The panel's decision, which had reversed the conviction on count three because there was no actual effect on interstate commerce, erroneously took a hindsight view of the situation. The offense occurred when the extortionate payment was made. At the time petitioner extorted the money in exchange for facilitating the construction of

[6] Other courts have held that a potential effect on interstate commerce is sufficient for Hobbs Act jurisdiction even where no actual effect occurs. See *United States* v. *Crowley*, 504 F. 2d 992, 998, n. 13 (C.A. 7); *United States* v. *Augello*, 451 F. 2d 1167, 1169–1170 (C.A. 2), certiorari denied, 405 U.S. 1070; *United States* v. *Hyde*, 448 F. 2d 815, 836 (C.A. 5), certiorari denied, 404 U.S. 1058; *United States* v. *Pranno*, 385 F. 2d 387, 389 (C.A. 7), certiorari denied, 390 U.S. 944 and *sub nom. Seidler* v. *United States*, 390 U.S. 972; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856.

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the animal hospital, the flow of materials in interstate commerce was essential to the project. The offense occurred at the moment of payment, thus creating jurisdiction and allowing for immediate prosecution. The fact that subsequent events caused the deal to fall through had no bearing on the jurisdictional question.

Petitioner's contention and the view adopted by the panel decision of the court of appeals would lead to results that could not have been intended by Congress in passing this broad statute. The panel's decision would force the government to delay prosecution until the project is begun to ensure an actual effect on commerce. Thus, prosecution could be delayed for unconscionably long periods of time. Moreover, if the government were to commence prosecution prior to the beginning of the project, the defendant could then seek to have the project dropped or delayed in order to defeat federal jurisdiction. In light of the prophylactic purposes of the Hobbs Act, Congress could not have intended the construction placed upon it by the panel decision. Rather, the *en banc* holding that a potential effect on commerce at the time of the extortionate payment is sufficient to create federal jurisdiction under the Hobbs Act, is a more accurate reflection of the scope of the statute as intended by Congress.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
SHIRLEY BACCUS-LOBEL,
KENNETH G. SPILLIAS,
Attorneys.

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